Pruitthealth Veteran Services-North Carolina, Inc. *and* Ricky Edward Hentz. Case 10–CA–191492

February 5, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On May 4, 2018, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[1] and conclusions and to adopt his recommended Order as modified and set forth below.[2]

ORDER

The Respondent, Pruitthealth Veteran Services-North Carolina, Inc., Black Mountain, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees not to discuss their wages.

(b) Instructing employees not to express other employees' complaints about working conditions.

(c) Issuing disciplinary notices to, demoting or transferring to less favorable work assignments, and/or discharging employees because they expressed employee complaints about racial discrimination in the workplace against employees of color to local or corporate management.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employee Ricky Edward Hentz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Hentz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Hentz for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline, demotion, and discharge of employee Hentz, and within 3 days thereafter, notify Hentz in writing that this has been done and that the discipline, demotion, and discharge will not be used against him in any way.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We do not rely, however, on the judge's findings that Tammy Ellis took notes of a telephone conversation with Ricky Hentz regarding his complaint of a racially hostile work environment and that such notes contradicted her testimony.

In finding that Charging Party Hentz engaged in protected concerted activity, we rely only on the judge's findings pertaining to Hentz's communications with other employees and to supervisors about group complaints that actions by the Respondent's management created a workplace atmosphere of racial discrimination. We thus find it unnecessary to pass on the judge's findings that Hentz engaged in any other protected concerted activity.

The Respondent has not excepted to the judge's findings (1) that Justin Morrison, the Respondent's administrator, unlawfully told Hentz to "stay in your lane" when Hentz informed him that LPN Sigmund had said she was unfairly treated by management in connection with her classification and scheduling; and (2) that the Respondent unlawfully told employees not to discuss their wage rates.

[2] We amend the judge's remedy and modify the Order in several respects. We shall order the Respondent to compensate Hentz for the adverse tax consequences, if any, associated with receiving a lump-sum backpay award and to file with the Regional Director for Region 10 a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). In addition, in accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Hentz for his reasonable search-for-work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Finally, we shall substitute a new notice to conform to the Order as modified.

(f) Within 14 days after service by the Region, post at its facilities in Black Mountain, North Carolina, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 9, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 5, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you that employees may not discuss their wages or other terms and conditions of employment.

WE WILL NOT tell you not to express other employees' complaints about working conditions or otherwise not to act in concert for their mutual aid or protection.

WE WILL NOT discipline, demote, or discharge any of you for engaging in protected concerted activities by expressing other employees' group complaints about working conditions.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights described above.

WE WILL, within 14 days from the date of the Board's Order, offer Ricky Edward Hentz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed

WE WILL make Hentz whole for any loss of earnings and other benefits resulting from our discrimination against him, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Hentz for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discipline, demotion and discharge of Hentz, and WE WILL, within 3 days thereafter, notify him in writing this has been done and that that the discipline, demotion and discharge will not be used against him in any way.

[3] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

PRUITTHEALTH VETERAN SERVICES-NORTH CAROLINA, INC.

The Board's decision can be found at www.nlrb.gov/case/10-CA-191492 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Joel R. White, Esq., for the General Counsel.
Glen C. Shults, Esq. and *Linda E. Vespereny, Esq.,* of Asheville, North Carolina, for the Charging Party.
Jana L. Korhonen, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. After a new administrator took command of the Respondent's nursing home for military veterans, the Charging Party told him that employees believed there was racial prejudice in the workplace. Ordered to "stay in your lane," the Charging Party took the employees' complaint to HQ. I find that the administrator discharged him for this protected concerted activity, thereby violating Section 8(a)(1) of the Act.

Procedural History

This case began on January 19, 2017, when the Charging Party, Ricky Edward Hentz, filed an unfair labor practice charge against the Respondent, Pruitthealth Veteran Services-North Carolina, Inc., which was docketed as Case 10–CA–191492. Hentz amended this charge on February 15, 2017.

On May 30, 2017, after investigation of the charge, the Acting Regional Director for Region 10 of the National Labor Relations Board, by the Acting Officer in Charge for Subregion 11, pursuant to authority delegated by the Board's General Counsel, issued a complaint and notice of hearing, referred to below as the complaint. The Respondent filed a timely answer.

On September 12, 2017, a hearing opened before me in Asheville, North Carolina. It continued on September 13 and closed on September 14, 2017. Thereafter, the parties filed briefs, which I have carefully considered.

Filing and Service of Charges

The complaint alleges that Ricky Edward Hentz filed the initial charge against Respondent on January 19, 2017, the amended charge on February 15, 2017, and that copies were served on Respondent those same dates. The Respondent has admitted receipt of the charges but has denied, for lack of knowledge, that Hentz filed them on the dates alleged.

Based on the charges themselves and the certificates of service of those charges, noting the Respondent's admission it received copies of the charges and the absence of any evidence to the contrary, and further noting the presumption of administrative regularity, I find that the General Counsel has proven that the charges were filed and served as alleged in complaint paragraphs 1(a) and 1(b).

Admitted Allegations

In its answer to the complaint, and by stipulation during the hearing, the Respondent admitted a number of allegations raised in the complaint. Based on those admissions, I find that the General Counsel has proven the allegations raised in complaint paragraphs 2, 3, 4, and portions of complaint paragraph 5.

More specifically, I find that at all material times, Respondent has been a corporation engaged in the operation of a nursing home and rehabilitation facility in Black Mountain, North Carolina, at which it provides long-term care and medical services for military veterans. This facility in Black Mountain, North Carolina, will be referred to below as the facility or the nursing home.

Further, based on the Respondent's admissions, I conclude that it meets the statutory and discretionary standards for exercise of the Board's jurisdiction, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Also, based on the Respondent's answer, I find that at all material times the Respondent has been a health care institution within the meaning of Section 2(14) of the Act.

Complaint paragraph 5 alleges that a number of individuals, identified by name, are Respondent's supervisors within the meaning of Section 2(11) of the Act and/or its agents within the meaning of Section 2(13) of the Act. By stipulation, for purposes of this proceeding and appeals arising from it, the Respondent has admitted that some (but not all) of the individuals named in complaint paragraph 5 are its supervisors and/or agents. Based on these admissions, I make the following findings.

The nursing home administrator, Justin Morrison, was the Respondent's supervisor, and accordingly its agent, within the meaning of Section 2(11) and 2(13) of the Act, respectively, at all times from September 1, 2016, through December 13, 2016.[1]

The Respondent's corporate regional human resources manager, Della Mervin, was the Respondent's agent, within the meaning of Section 2(13) of the Act, from November 1, 2016 through December 31, 2016.

The Respondent's human resources/payroll coordinator, Melissa (Missy) Ellege, performed human resources-related services for Respondent and was Respondent's agent, within the meaning of Section 2(13) of the Act, from September 1, 2016 through September 30, 2016.

[1] Based upon Morrison's testimony, I further conclude that he remained the nursing home's administrator, and therefore the Respondent's supervisor and agent, at all times from December 13, 2016 through at least September 14, 2017.

Mary Ellen Shepherd, who was the director of health services at the nursing home during the period September 1, 2016 through October 31, 2016, was then the Respondent's supervisor within the meaning of Section 2(11) of the Act and, accordingly, its agent within the meaning of Section 2(13) of the Act.

The Respondent's director of health services, Crysta Bloomberg, was a supervisor of the Respondent, within the meaning of Section 2(11) of the Act, and accordingly, its agent within the meaning of Section 2(13) of the Act, during the time period October 24, 2016 through December 13, 2016. Based upon her testimony at hearing, I further find that her name is now Crysta Dickens.[2]

Facts

The Respondent operates 92 facilities, among them, a nursing home in Black Mountain, North Carolina, for military veterans. The facility's administrator, Justin Morrison, described it as providing a "home-like environment." The veterans live in 4 wings named Alpha, Bravo, Charlie, and Delta.

The Respondent rates the quality of its 92 facilities. When Morrison took command of the Black Mountain nursing home in August 2016, it ranked near the bottom. Morrison took steps to improve quality, including enforcing work rules more rigorously. Within 1 year, the nursing home rose in the quality rankings to 5th place.

A month after Morrison arrived at the nursing home, Hentz began work there as a certified nursing assistant. Friction soon developed between them. Hentz' personality did not fit the military mold. Moreover, Hentz, who is African-American, complained to the corporate-level human resources department that racial prejudice tainted the work environment, prompting an investigation.

The General Counsel alleges that when Hentz complained to corporate-level officials, he was seeking relief not merely for himself but also for other employees also affected by the racial prejudice which he perceived. Therefore, the government argues, it constituted concerted activity protected by Section 7 of the Act. The General Counsel further alleges that the Respondent unlawfully discharged Hentz because he engaged in this protected, concerted activity.

The Respondent disputes that Hentz was speaking on behalf of anyone other than himself and therefore contends that Hentz' complaint to the corporate officials did not fall within the Act's protection. The Respondent further argues that, in any event, it did not discharge Hentz because he complained to corporate officials but for failure to comply with the Respondent's attendance rules.

Complaint Paragraphs 6 and 7

The first unfair labor practice allegations in the complaint do not focus on Hentz' termination but charge that the Respondent's managers told employees not to disclose their wage rates to other employees.[3] The Respondent denies these factual allegations, raised in complaint paragraphs 6 and 7, and also denies the legal conclusion, alleged in complaint paragraph 14, that it thereby violated Section 8(a)(1) of the Act.

Complaint paragraph 6 alleges that about September 9, 2016, Respondent, by Mary Ellen Shepherd, in Shepherd's office at Respondent's Black Mountain Veterans Home, directed employees not to engage in concerted activities for mutual aid and protection by telling employees not to discuss their wages with each other. The Respondent denies this allegation.

When Hentz applied for work in September 2016, he spoke with the Respondent's director of health services (DHS), Shepherd. The Respondent has stipulated that during this time period, Shepherd was a supervisor within the meaning of Section 2(11) of the Act. Hentz testified concerning the September 9, 2016 interview at which Shepherd offered him a job as a certified nursing assistant (CNA):

> Q. What, if anything, did she say about the CNA position?
> A. She told me it was $14 an hour between 6:00 a.m. and 2:00 p.m. and that it would be $15 an hour from 2:00 p.m. till roughly 5:59 a.m. I applied for the 2:00 to 10:00 shift, so my pay would have actually been $15 an hour.
>
> Q. Now was anything else said regarding the wage rate?
> A. Yes. She told me not to discuss my wages when I come to the floor. That previous DHSes had, to use her words, low-balled the CNAs before her and that she was trying to bring people in at a fair rate.

Shepherd no longer worked for the Respondent and did not testify. Crediting Hentz' uncontradicted testimony, I find that Shepherd did tell him not to discuss his wages when he "came to the floor." The context clearly establishes that those words amounted to a prohibition on disclosing his wages with other employees. Thus, she further explained that her predecessors had "low-balled" nursing assistants who had been hired earlier. Therefore, I conclude that she was explaining to Hentz that he should not disclose his wage rate to other employees because they were not earning as much per hour. Further, I conclude that the General Counsel has proven the allegations raised in complaint paragraph 6.

Complaint paragraph 7 alleges that about September 20, 2016, the Respondent, by Melissa Ellege, directed employees not to engage in concerted activities for mutual aid and protection by telling employees not to discuss their wages with each other. The Respondent denied this allegation.

The Respondent stipulated that Ellege, its human resources/payroll coordinator during September 2016, was at that time, its agent as defined by Section 2(13) of the Act. Accordingly, I conclude that statements made by Ellege during the course of her work duties may be imputed to the Respondent.

After Hentz began working for the Respondent, he went to Ellege's office to complete some paperwork and to be

[2] Additionally, based on her testimony, I find that she remained the director of health services, and a supervisor of the Respondent, at the time of the hearing in mid-September 2016.

[3] In general, prohibiting employees from discussing wages or other terms and conditions of employment interferes with two rights guaranteed by Sec. 7 of the Act, the employees' right to form, join or assist a labor organization (because discussing working conditions is a predicate to deciding whether to unionize) and the right to engage in other concerted activities for their mutual aid or protection. See, e.g., *Waco, Inc.*, 273 NLRB 746, 748 (1984).

photographed for his employee identification badge. Hentz testified that, during this process, Shepherd entered the office:

Q. When you say she had you sign, who are you referring to?
A. Missy. Missy Ellege.

Q. What, if anything, happened after Ms. Shepherd arrived in the office?
A. She said, oh, I see you've already met Ricky. I think he's going to be great here. I think he'll be a great scheduler. And she said to Missy I've already told him what his wage is and he knows not to discuss his wages.

Q. Did anybody respond to that?
A. Missy chimed up and she said, yeah, you don't want to be doing that, discussing wages on the floor because that leads to problems.

Neither Shepherd nor Ellege took the witness stand and Hentz' testimony, which I credit, stands uncontradicted. Therefore, I find that Shepherd and Ellege made the statements Hentz attributed to them. Further, based on the Respondent's stipulations that Shepherd was its supervisor and Ellege its agent during this time period, I impute their statements to the Respondent.

Although the Respondent did not call either Shepherd or Ellege to testify, it did address these complaint allegations in the testimony given by its nursing home administrator, Morrison. Because he was not present when Shepherd and Ellege made the statements to Hentz described above, Morrison's testimony does not shed light on what they said. Rather, Morrison testified that the Respondent did not have a policy prohibiting the discussion of wages:

Q. Does the Veterans Home maintain any policies that prohibit discussions about wages?
A. No.

Q. Do you know if the facility has ever disciplined someone for discussing wages?
A. No.

Q. No, they have not or no, you don't know?
A. No, they have not.

Q. Has the facility ever terminated an employee to your knowledge for discussing wages?
A. No, they have not.

However, other testimony suggests that although Morrison might have been telling the truth, he wasn't telling the whole truth. The Respondent's counsel asked Morrison if the facility had any *policy* prohibiting employees from discussing their wages, but did not ask whether the facility had a *practice* of forbidding such discussions. The record indicates that Respondent had such a practice and that, in fact, Morrison was one of the practitioners.

Jennifer Horton began working at the nursing home in August 2016, as a registered nurse supervisor, and then applied for another position within the facility, that of "senior care partner." This job involved dealing with complaints raised by patients' relatives concerning the quality of care. Horton testified that, after learning she had been accepted for this position, she went to Administrator Horton to obtain a job offer letter:

Q. Why were you asking about that offer letter?
A. Because I wanted my position to be down in writing.

Q. Did Mr. Morrison respond?
A. Yes. He printed it off when he got it, and he came and sat down with me, showed me my salary.

Q. When he showed you the offer letter, did he say anything?
A. He told me my salary was confidential, not to discuss it.

Although Morrison returned to the witness stand after Horton testified, he did not deny telling her that her salary was confidential and not to discuss it. Crediting Horton's uncontradicted testimony, I find that Morrison did make this statement.

It is significant that Morrison not only told Horton not to discuss her salary, but also said that it was "confidential." That at least suggests that Respondent had a practice of placing wage information into a special category of matters not to be disclosed. Shepherd's statement to Ellege, that she already had told Hentz "what his wage is and he knows not to discuss his wages," further indicates that Respondent had a general practice of admonishing employees not to disclose such information.

In these circumstances, the distinction between a "policy" and a "practice" seems somewhat artificial. Morrison's testimony that the Respondent had no "policy" of forbidding employees from discussing their wages, therefore seems a bit disingenuous, particularly because Morrison himself had instructed an employee not to reveal her salary to other workers. This testimony also may be considered in assessing Morrison's credibility as a witness.

It has long been established that a rule prohibiting employees from discussing their wage rates is unlawful. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992); *Heck's, Inc.*, 293 NLRB 1111 (1989); and *Waco, Inc.*, 273 NLRB 746 (1984). Accordingly, I recommend that the Board find that the Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraphs 6 and 7.

Hentz' Protected Activity

At this point, it will serve clarity to follow the chronological order of events rather than the sequence of allegations in the complaint. Therefore, before discussing the conduct alleged in complaint paragraph 8, it will be helpful to "set the stage" by summarizing the Charging Party's protected activity, described as follows in complaint paragraph 9: "During the period from about October through December 2016, on multiple occasions, employee Hentz concertedly complained to Respondent about employees' concerns with racial discrimination, staffing, and personnel issues."

The Respondent denies that Hentz engaged in protected concerted activities. In its brief, the Respondent argues that credited evidence fails to establish that when Hentz complained to management he was acting on behalf of anyone but himself:

> To find that an employee has engaged in concerted activity for employees' mutual aid and protection, the Board requires the

activity "be engaged in with or on the authority of other employees, and not solely by and on behalf of himself." *Meyers Indus. (II)*, 281 NLRB 881, 885 (1986); *Walmart, NLRB Div. of Advice*, No. 17–CA–25030 (Sept. 25, 2011) (ALJ held that employer lawfully discharged employee because employee's individual gripe did not rise to concerted activity under the Act).

In *Fresh & Easy Neighborhood Market, Inc*., 361 NLRB 12 (2014), a divided Board overruled *Holling Press, Inc.*, 343 NLRB 301 (2004), holding that an employee engages in "concerted activity" for the purpose of "mutual aid or protection" within the meaning of Section 7 when the employee seeks help from coworkers in logging a sexual harassment complaint. In *Fresh & Easy*, the Board recognized that, whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of coworkers. Id. The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. Id.

The General Counsel has not shown and cannot show that Mr. Hentz's communications to PruittHealth's corporate office, to Mr. Morrison, or otherwise satisfy the requirements for concerted activity for the purpose of mutual aid or protection as articulated in either *Meyers Industries II* or *Fresh & Easy*. Indeed, the record establishes that Mr. Hentz called PruittHealth's corporate office and complained of race discrimination by the Activities Director Amy Ferguson. Tr. 420:6–10; 376:4–5; 150:1–153:14. Mr. Hentz provided the names of Danielle Jeter and Linda Brinson, who were alleged to have been disciplined on the same day by Ms. Ferguson, but Mr. Hentz stated, "I'm not here to talk about them. I'm here to talk about me." Tr. 420:6–10; 376:4–5; 150:1–153:14. During this investigation, Mr. Hentz stated that he did not feel that Mr. Morrison had discriminated against him, just the Activities Director. Tr. 357:4–9. Mr. Hentz provided no written documentation to Ms. Mervin. Tr. 362:12–16. No evidence shows Mr. Hentz sought assistance from his coworkers in submission of any group complaint to the Veterans' Home. No evidence shows Mr. Hentz to have circulated any petition or to have articulated any change in policy supported by two or more individuals and related to their working conditions. Thus, the General Counsel failed to establish there was any concerted protected activity for employees' mutual aid or protection with respect to Mr. Hentz's call to PruittHealth's corporate office. Further, the only link to Mr. Hentz's coworkers in the submission of any of his complaints to PruittHealth's corporate office is the reference to their names, and past events allegedly involving them, which is weak and attenuated at best, and insufficient to satisfy the applicable legal standard.

Before weighing the Respondent's legal arguments, it will be helpful to begin by summarizing the facts. Hentz' employment at the Respondent's nursing home began on September 20, 2016. The Respondent assigned him to work as a scheduler, a job which brought Hentz into contact with many other employees and thus gave him the opportunity to hear their complaints about terms and conditions of employment. Although Hentz still spent about 10 percent of his worktime performing patient care duties, similar to those of other CNAs, his primary responsibility involved preparing schedules showing which nurses and nursing assistants would be on duty during any particular shift.

Before Hentz could place on the schedule the names of those to be assigned to a particular shift, he had to contact employees to find out whether they were available for duty at that time. Often, these employees would complain to him about work-related matters, including wages.[4] A frequent, recurring complaint concerned understaffing.

Each wing of the facility needed one nurse and 3 nursing assistants for each shift. Operating with fewer employees increased the risk to patients and also made a CNA's job more burdensome. A CNA's patient care duties include some strenuous activities, such as lifting patients in and out of bed. The job becomes significantly more arduous when the shift is shorthanded.

Hentz communicated to Administrator Morrison the employees' complaints about understaffing. However, Administrator Morrison saw things differently. Morrison testified that there had never been a time, to his knowledge, when the facility failed to meet the minimum staffing requirements set by the government. When asked about how he expected employees to communicate with patients' relatives about the care provided, Morrison testified as follows:

> Q. What are those expectations?
> A. To provide factual information to those families. If we were to have, and this has happened on numerous occasions, where I've had a grievance from a family, sat down and met with them, and they've seen two or three CNAs sitting in the dining room talking and their mother or father not receive a shower that day or whatever the care was provided, and they ask why that care wasn't provided and the easy out or easy answer is just to say, oh, we don't have enough staff.
>
> Q. And do you believe that's an appropriate or inappropriate response?
> A. That's inappropriate.
>
> Q. Why do you say that?
> A. Because it paints a negative light on the facility and the information is actually inaccurate.[5]

[4] According to Hentz, the employees who complained to him about work-related matters included Rick Luce, Joanna Severson, Lucinda Geter, Danielle Jeter, Linda Brinson, Brandi Sigmund, Tiffanie Robinson, Toya Fleming, and Marie Williams.

[5] Citing *Labor Board v. Electrical Workers (Jefferson Standard)*, 346 U.S. 464 (1953), the Respondent's brief suggests that if an employee told a resident's family member that the nursing home was understaffed, it would constitute disparagement of the Respondent's product which fell outside the protection of the Act. The record does not reflect that any employee engaged in such conduct and the complaint does not include any allegation which would raise this issue. Therefore, I do not address it.

This testimony suggests that Morrison believed employees simply were claiming understaffing as an excuse for failing to perform their assigned duties. Moreover, based on Hentz' credited testimony, I conclude that Morrison did not appear to take employees' complaints of understaffing seriously. Hentz described a recurring situation: As Morrison went down the hall, Hentz would walk along beside him, relay the complaint about being understaffed, and Morrison would reply that they were "working on it."

Crediting Hentz' testimony, I find that Morrison did typically respond by saying they were "working on it," but this answer calls into question Morrison's testimony that employee complaints about understaffing were "actually inaccurate." To say, "we're working on it" acknowledges the existence of a problem requiring attention. If Morrison really believed that no understaffing problem existed, to say "we're working on it" would be perfunctory, dismissive, and disingenuous.

Events in the latter part of October 2016, suggest both that Morrison did not believe the employee complaints about understaffing and that a time came when he became fed up with hearing them. These events began when an employee, Rick Luce, told Hentz that the director of health services had hired four or five CNAs to "work the floor," that is, to perform the strenuous patient care duties. Such welcome news reasonably would have demonstrated to employees that Administrator Morrison had been telling the truth when he said that management had been "working on" the understaffing problem. Even more importantly, the news would have raised the nursing assistants' expectations that help indeed was on the way.

However, any such hope did not last long. Luce told Hentz that the administrator had not assigned the new CNAs to "work the floor," as expected, but instead had given those new workers other, lighter duties, such as taking patients to activities. Hentz went to Morrison's office and relayed Luce's complaint. No one except Hentz and Morrison were present. Hentz described the conversation as follows:

Q. How did the conversation begin?
A. Well, I came in. I told him that I was working on the schedule. I was trying to get people. I showed him the schedule, as I did on a daily basis. And he said okay. And then at that point, I addressed, I said I've spoken to some of the CNAs. I didn't tell him it was Rick Luce. I guess he knows now. But I said I spoke with some CNAs on the floor and they're really upset that you took those CNAs that Mary Ellen hired and put them in other positions rather than putting them on the floor to do work as a CNA on the floor.

Q. Did he respond in any way to those concerns?
A. He did. I come in. He was standing up at his desk. He had his pen and he threw the pen down, and he said this is my building and I'll do what the F I want.

Q. And when you say—you believe you bleeped a word.
A. I did.

Q. You don't have to say what it was but can you in some way indicate what it was?
A. I'm sorry, Your Honor, but I'm going to say it. I mean he said what sounded like the word fuck.

Q. Did he actually say the word?
A. He did not. He left out the vowel sounds. He said MF, Your Honor.

Morrison denied both throwing down his pen and swearing. He testified:

Q. Have you ever thrown your pen while at work?
A. No.

Q. Have you ever cursed at a partner at work?
A. No, I have not.

A credibility analysis later in this decision will explain why I conclude that Hentz' testimony accurately reflects what Morrison said and did. At this point, however, the focus rests on Hentz' actions to determine whether he was engaging in protected, concerted activity when he reported the employees' concerns about staff assignments to Morrison.

The Respondent's brief advocates that the Board adopt a definition of "protected, concerted activity" more limited in scope than how that term is defined by current Board precedents. However, as the Respondent's brief acknowledges, the judge must follow the Board's caselaw. Doing so, I conclude that Hentz' reporting the employees' complaints to Morrison falls within the protection of Section 7 of the Act.

To prove that Hentz was engaging in protected, concerted activity, the General Counsel must show that he was acting for, or on behalf of, other workers or was acting alone to initiate group action, such as by bringing group complaints to management's attention. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).[6] Hentz did exactly that, bringing group complaints to management's attention. Thus, he told Administrator Morrison: "I spoke with some CNAs on the floor and they're really upset that you took those CNAs that Mary Ellen hired and put them in other positions rather than putting them on the floor to do work as a CNA on the floor."

When Hentz expressed the employees' concerns to Morrison in the administrator's office, he was engaging in activity protected by Section 7 of the Act. Likewise, Hentz engaged in protected activity when he walked along with Morrison and told the administrator about the CNAs complaints that the floors were understaffed.

[6] The Board has consistently defined protected concerted activity to encompass the lone employee acting for or on behalf of other workers. The Act protects the employee who speaks after receiving fellow employees' explicit authorization to express their complaint, and that protection also extends to an employee who, having heard the work-related concerns of other employees, voices those complaints without having asked them for permission to do so. The Act similarly protects the individual employee who speaks seeking to initiate group action. *Kvaerner Philadelphia Shipyard*, 346 NLRB 390 (2006); *NLRB v. City Disposal Systems*, above; *Meyers Industries (II)*, 281 NLRB 882 (1986); *Globe Security Systems*, 301 NLRB 1219 (1991); *Alaska Pulp Corp.*, 296 NLRB 1260 (1989), enfd. 944 F.2d 909 (9th Cir. 1991).

Hentz had only a little to gain personally by conveying these complaints to management because 90 percent of his own work involved scheduling rather than patient care. Assigning more CNAs to patient care would improve the working conditions for others working "on the floor," but nine-tenths of the time Hentz was not working "on the floor." He had an office. Thus, there can be no doubt that Hentz was communicating other employees' concerns to management and not simply speaking to benefit himself.

As described in greater detail below under the heading "Complaint Paragraph 10," Hentz also telephoned corporate-level management to express employees' concerns about racial prejudice in the workplace. Hentz made this call shortly after having conversations with other employees on or around November 9, 2016.

Hentz did have some personal interest in this complaint. A supervisor had issued him a reprimand for eating ice cream in an area where staff were not supposed to consume food. When he discussed this incident with other employees, he discovered that they shared his belief that racial prejudice resulted in some employees being treated differently from others. For example, Hentz described his conversation with another CNA, Marie Williams:

> Q. When you asked her about race, did she respond in any way?
> A. She did. She said there's definitely a difference in the way that they are treated. She said she just keeps her head down, she keeps going, she doesn't really get involved with that, she tries not to give them reason to, you know, any reason to come to her with any kind of issues.[7]

Hentz spoke with other employees as well before telephoning the corporate headquarters in Norcross, Georgia. A corporate-level manager, Tammy Ellis, returned his call and discussed the matter with Hentz. Her notes of that call state:

> Mr. Hentz stated there was a Incident [sic] with Amy Ferguson, activities director, on November 9, 2016 when he was given a bowl of ice cream by the activities staff while he was on his way to his office. Mr. Hentz stated Diane Clark, administrative assistant, called him to the side to speak with him. Mr. Hentz stated during that time he believes he took one or two bites of ice cream, therefore, later in the day, Ms. Ferguson reprimanded him for eating in the front office. Mr. Hentz stated he has never heard this rule before and people are eating baked cookies all the time in the front office.
>
> Mr. Hentz stated this is a wrongful reprimand because Ms. Ferguson has a history of nitpicking African-American employees. Mr. Hentz stated, for example, one week ago, Ms. Ferguson reprimanded Danielle (last name unknown), activities assistant, who is an African-American, for wearing yoga pants. Mr. Hentz stated this happened on the exact same day that Jennifer B., business office manager, who is Ms. Ferguson's sister, came into work wearing extremely tight pants. Mr. Hentz stated Ms. Ferguson never did anything to penalize Jennifer.
>
> Mr. Hentz stated both Danielle and Linda Brinson, activities assistant, can attest to the racial discrimination they are subjected too. [sic]

These notes indicate that although Hentz focused, to some extent, on the reprimand he had received, his complaint was more general and concerned other employees as well. Thus, Ellis' notes indicate that Hentz used the plural—employees—in stating that a supervisor had "a history of nitpicking African-American employees." Similarly, her notes show that Hentz gave Ellis the names of two employees who could "attest to the racial discrimination" to which *they* were subjected.

In sum, even the Respondent's records demonstrate that Hentz complained about working conditions affecting employees other than himself, and did so after discussing these conditions with the other employees. I conclude that when Hentz telephoned the corporate headquarters and spoke with Manager Ellis, he was engaged in protected concerted activity.

After Hentz' conversation with Ellis, corporate management sent an investigator, Della Mervin, to the Black Mountain facility.[8] To support its argument that Hentz was not engaged in protected concerted activity when he complained to corporate management about racial prejudice, the Respondent points to a comment which Hentz supposedly made to Mervin during her investigation. Specifically, Mervin testified:

> Q. Did Mr. Hentz make any statements during the investigation as to whether Ms. Brinson had asked him to raise a complaint?
> A. Mr. Hentz's comment to me was, you know, I'm not here to talk about them. I'm here to talk about me, but these are other people that you can talk to because they've seen things that have happened.

The Respondent points to Hentz' supposed "I'm here to talk about me" statement as evidence that he wasn't acting in concert with any other employees. The Respondent's brief urges that no evidence "shows Mr. Hentz sought assistance from his coworkers in submission of any group complaint" and that no evidence "shows Mr. Hentz to have circulated any petition or to have

[7] Williams did not testify. However, the truth of the matter she asserted—that employees were treated differently because of race—is irrelevant to the issue under consideration, which is whether Hentz engaged in protected concerted activities. Here, I rely on Hentz' testimony to find that Williams expressed to him her opinion that the Respondent treated employees differently based on their race and note that such an opinion concerns a condition of employment. Additionally, it is appropriate to observe that Williams' comment to Hentz concerned not just how she was treated as an employee but how "*they* are treated," signifying an issue of concern to other employees as well. Clearly, Hentz' conversation with Williams constituted protected, concerted activity.

This issue of whether Respondent's management actually did treat employees differently based on race is not before me, so I need not, and do not, make any finding about it. However, it may be noted that during the cross-examination of Registered Nurse Horton, the Respondent's counsel asked if Administrator Morrison made choices based on race. Horton answered: "I do believe that he does have some prejudice."

[8] Mervin concluded that Hentz' allegations of racial prejudice were unsubstantiated. Her investigation will be discussed further below.

articulated any change in policy supported by two or more individuals and related to their working conditions." This argument reveals that the Respondent underestimates the scope of activity protected by the Act.

Respondent's argument assumes that Hentz must seek the assistance of his coworkers in submitting a group complaint. In fact, Hentz' coworkers *were* assisting him by providing him information about instances of apparent racial prejudice. In turn, he assisted them by voicing their complaint to corporate-level management. The assistance was mutual, and falls within Section 7's description of employees' activities for their "mutual aid or protection." 29 U.S.C. 157.

The Respondent is correct in stating that no evidence shows that Hentz circulated any petition. However, the Act does not require employees to perform any such formality to enjoy its protection. The statutory language has not been construed so narrowly and if it were, almost no employee discussion about working conditions would be protected.

The Respondent also underestimates the Act's scope when it implies that, to fall within the protection of Section 7, Hentz had to "articulate" a "change in policy." Almost all employers now have some kind of written policy prohibiting racial discrimination, and I don't doubt that the Respondent is among them. Hentz was not protesting this policy but rather what he believed to be the supervisor's practice. That practice, even if contrary to Respondent's written policy, created the environment in which the employees worked. Section 7 protects employees' concerted complaints against employment practices as well as those against employers' policies.

Respondent also errs in contending that Hentz did not "articulate any change," sought by two or more employees and related to working conditions. Hentz indeed had spoken with other workers, who agreed with him that African American employees were being treated differently, and he sought a change in the workplace as vital as it was easy to understand: Stop discriminating on the basis of race.

In arguing that Hentz was engaging in unconcerted and therefore unprotected activity, the Respondent points to the statement Hentz supposedly made to Mervin, "I'm not here to talk about them. I'm here to talk about me, but these are other people that you can talk to because they've seen things that have happened."

Mervin took the witness stand after Hentz had testified, but Hentz, as the Charging Party, was available for recall to give rebuttal testimony. Nonetheless, the General Counsel did not recall him to the stand, and no testimony contradicts Mervin's testimony regarding what Hentz said.

Mervin's phrasing indicates that she was summarizing the substance of what Hentz said rather than quoting his exact words. The fact that Mervin was paraphrasing is important because it increases the opportunity to take Hentz' words out of one context and place them in another which distorts what he had meant.

Based on my observations of the witnesses, I have more confidence in the accuracy of Hentz' testimony than that of Mervin, who is one of the Respondent's corporate-level managers. Mervin's tone of voice and demeanor lead me to conclude that she had not come to the courtroom to make Hentz look good but rather to make her company look good.[9]

According to Mervin, Hentz gave her the names of other employees to contact "because they've seen things that have happened." It is significant that Hentz did not provide these names because the employees had witnessed what happened to *him* when he received the reprimand for eating ice cream. These other employees would be of no value to Hentz in challenging the reprimand he had received for eating ice cream because he freely admitted he had done so. The words are most reasonably understood as meaning that these witnesses had seen *other* things which also demonstrated the presence of racial prejudice in the workplace.

Hentz' testimony, which I believe quite reliable, clearly establishes that he was not the only employee who perceived an atmosphere of racial bias at the nursing home. It also shows that his complaint to management concerned this hostile work environment, which affected many employees, and not just his reprimand for eating ice cream.

Even Mervin's testimony, in which I do not place quite as much trust, supports the conclusion that Hentz' complaint to management concerned racial prejudice perceived by other employees as well as himself, which made their work experience unpleasant. For example, Mervin, on cross-examination, admitted that Hentz told her "the leadership does not take action. People do not feel that they're being heard." She also admitted that Hentz said "that administrative was too busy. People feel like they don't matter." Likewise, Mervin's notes of her interview with Hentz reflect that he told her that "people do not feel they are being heard" and that "people feel like they don't matter."

Hentz did not say "I feel" but rather "people feel." By "people," Hentz clearly meant other employees at the nursing home and the context clearly conveys that these employees felt that they were not being heard *by their supervisors*.[10] Without doubt, in these circumstances, Hentz was expressing to management other employees' complaints about a condition of employment. Under extant and longstanding Board precedent, Hentz was

[9] For reasons discussed in the section of this decision concerning pretext, I conclude that Mervin came to the facility and went through the motions of an investigation not to ascertain facts but, essentially, to reduce the Respondent's exposure to liability in any employment discrimination lawsuit by making it appear that the Respondent took conscientious steps to address such complaints. I believe that when she testified, Mervin likely had a similar objective in mind.

[10] To establish that Hentz was engaged in protected concerted activity when he voiced the employees' complaints, the General Counsel does not have to prove that the employees' perceptions were correct. When Hentz told the manager that employees felt they weren't being heard, Sec. 7's protection does not depend on the merits of the employees' complaint. However, the record leaves no doubt that the employees were sincere and had some basis for believing that management was not listening to them.

For example, after Hentz had repeatedly relayed to Morrison the employees' complaints that there were not enough CNAs performing certain arduous patient care duties, and after a supervisor then hired additional CNAs, Morrison did not allow the new employees to perform those duties but assigned them other work. Whether or not Morrison intended this action to signal that "this is my building and I'll do what the F I want," it certainly could leave employees feeling that they did not matter.

engaging in protected, concerted activity.

However, the Respondent seeks a change in Board precedent, specifically, the Board's decision in *Fresh & Easy Neighborhood Market, Inc*., 361 NLRB 151 (2014). The Respondent's brief acknowledges that the judge must follow Board precedent but states that the Respondent wishes to preserve its challenge to *Fresh & Easy Market* for consideration by the Board itself. The Respondent, citing Member Miscimarra's partial dissent in that case, argues that to constitute protected, concerted activity, an employee's action must be *for the purpose* of mutual aid or protection. The Respondent also advocates the position of Member Miscimarra that to constitute concerted activity, the employees' discussion must be more than mere talk and must involve or contemplate a joint endeavor to be "done or performed together in cooperation."

However, even before the Board's decision in *Fresh & Easy Market*, Board precedent did not require that, to be engaged in protected activity, employees had to be planning to take some specific concerted action, such as picketing, which involved more than one participant. See, e.g., *Compuware Corp*., 320 NLRB 101 (1995), enf. 134 F.3d 1285 (6th Cir. 1998), in which the Board found that an employee was engaged in protected concerted activity when, after discussing certain working conditions with other employees, he spoke out about them. See also *Allstate Insurance Co.*, 332 NLRB 759 (2000), in which the Board held that an employee who discussed working conditions with a magazine reporter was engaged in protected concerted activity.

The Board's decision in *Compuware Corp*. provides guidance here. Hentz spoke with other employees about their perception of racial prejudice in the workplace. Then he complained to management, including management at the corporate level. Clearly, if supervisors treat employees of a particular race differently, it affects all of them, not just one, and the remedy sought, cessation of such unequal treatment, benefits all. Accordingly, I reject the Respondent's argument that Hentz was not engaged in protected concerted activity.

Clearly, when Hentz contacted corporate management, and when he was interviewed by Mervin, he was speaking not only on his own behalf but also voicing the work-related complaints of other employees. Therefore, I conclude that, in doing so, he enjoyed the Act's protection.

Respondent's Knowledge of the Protected Activity

Without doubt, the Respondent was aware of Hentz' protected activity because that activity consisted of expressing *to management* the employees' complaints about terms and conditions of employment. Moreover, it is clear that Hentz' complaint to corporate management unsettled the nursing home administrator.

Registered Nurse Horton credibly testified[11] that when the investigator from corporate headquarters visited the facility, Administrator Morrison asked Horton "what the hell" was going on. When Horton asked Morrison what he meant, he responded by asking Horton if she thought he was racist. Such a question suggests that Morrison took Hentz' complaint personally. Morrison also remarked that Hentz thought that he, Morrison, was a racist, again suggesting that Hentz' complaint to the corporate level stung Morrison personally.

Horton's testimony also establishes that Morrison was aware of how much time Hentz spent with the investigator. On the investigator's last day at the nursing home, Morrison commented to Horton that Hentz would not let the investigator leave, "that he keeps talking."

Complaint Paragraph 8(a)

Complaint paragraph 8(a) alleges that in October 2016, Administrator Morrison told employees "this is my building, and I'll do what the fuck I want." Paragraph 8(a) further alleges that Respondent, through this statement, "informed its employees that it would be futile for them to engage in concerted activities for mutual aid and protection." Complaint paragraph 14 alleges that the Respondent thereby violated Section 8(a)(1) of the Act. The Respondent denies these allegations.

These allegations pertain to an exchange between Morrison and Hentz, in Morrison's office, in the latter part of October 2016. The testimony of Hentz and Morrison about this incident

[11] Because I believe Horton to be a more accurate witness than Morrison, I resolve conflicts in their accounts by crediting Horton's testimony and discrediting Morrison's. Accordingly, my findings of fact are based on Horton's version.

My conclusion that Horton's testimony is reliable particularly rests on her answers to questions during cross-examination. When Respondent's counsel asked her whether she believed that Morrison made employment decisions based on race, Horton replied that she did believe that Morrison "had some prejudice." The Respondent then confronted her with a presumably prior inconsistent statement, namely, that when Morrison had asked her if she thought he was a racist, she said no. However, she readily admitted that her reply to Morrison had not been truthful.

Horton's straightforward acknowledgement that she had been less than candid with Morrison increases my confidence that she was testifying truthfully on the stand. Morrison had placed Horton in a difficult position when he asked her "Do you think I'm a racist?" Simply out of politeness, almost anyone asked that question would deny having that opinion of the questioner. Moreover, Morrison was Horton's boss at the time. The fact that she did not reveal her true opinion to Morrison under such circumstances does not reduce my confidence in her truthfulness on the witness stand.

Additionally, it impressed me that in her conversation with Morrison, Horton did more than simply say "no" when Morrison asked if she thought he was a racist. When Morrison then said that Hentz believed him to be a racist, Horton replied "that sometimes that that is something that someone will say because they don't feel like they're not being heard." She then suggested that perhaps Morrison should talk to Hentz. Thus, Horton's response to Morrison's questioning was not simply a denial that she held such an opinion of him but rather included a gentle suggestion which could help improve communication between Morrison and Hentz. This tactful answer avoided accusing Morrison of any racial prejudice while, at the same time, encouraging him to listen to what Hentz was trying to tell him.

Horton gave a similarly nuanced answer when Respondent's counsel asked her if she believed that Morrison made employment decisions based on race. Her reply, that she believed Morrison did "have prejudice," stopped short of saying that she thought Morrison was a racist or that he based his decisions *solely* on race. Rather, it indicated a belief that racial prejudice was a factor affecting his decision-making. This carefulness in her testimony contributes to my conclusion that Horton was a trustworthy witness intent on testifying accurately.

appears above in the discussion of Hentz' protected, concerted activities. For the following reasons, I credit Hentz' account rather than Morrison's.

Hentz testified in detail concerning what was said, but Morrison only gave a general denial that he had ever cursed an employee or thrown a pen at work. Because of this vagueness, I have less confidence in Morrison's testimony.

Additionally, as discussed above, when Hentz would inform Morrison of an employee's complaint about understaffing, Morrison typically replied that they were "working on it." However, the record indicates that this stock answer did not reflect the truth. Morrison's testimony suggests that he believed employees were using "understaffing" as an excuse for not doing their jobs.

Morrison also appeared to indulge in exaggerations. For example, he testified that he received "five to six letters under my door every day that I came in" from staff members complaining about Hentz' performance as a scheduler. On its face, that claim arouses skepticism. If Morrison really had received five or six complaints about Hentz every workday, it must be wondered why Morrison didn't discharge him immediately.

No proof supports this extravagant claim. Although Morrison supposedly was receiving between 25 and 30 such complaints about Hentz *each week*, the Respondent did not offer even one of them into evidence. On cross-examination, Morrison testified as follows:

Q. You had—I believe you testified you had four to five letters submitted under your door.
A. Correct.

Q. Complaints about Mr. Hentz's scheduling?
A. Yes.

Q. You don't have any of those documents.
A. That's not something that I keep on a permanent basis.

Q. You don't have any of those documents, correct?
A. Correct. I don't keep documents that people slide under my door.

Which of Morrison's claims is hardest to believe? (1) That Hentz' performance so greatly offended his fellow employees they did not consider it sufficient to complain orally but instead took the time to write letters and slip them under the boss's door? Or (2) that up to a half dozen employees were so upset *each workday* by Hentz that they took the time to write such complaints? Or (3) that for some unexplained reason, Morrison had the unusual policy of not retaining documents that were slipped under his door?

Morrison's testimony that he discarded all these letters is particularly unbelievable because he admitted on cross-examination that he had gone through the Respondent's training for administrators and had been told that it was important to document an employee's poor performance. Moreover, he offered no good reason for disregarding this training. To the contrary, the reason he gave for discarding the letters makes no sense:

Q. And yet you never kept a single letter that you said was put under your door, four to five a day, about Mr. Hentz's scheduling performance, correct?
A. That's correct, that was sent to me on a daily basis.

Q. And you didn't keep a single one of them.
A. Half of my office—

Q. You didn't keep a single one of them?
A. No.

Q. Why?
A. Because it's speculation.

It seems highly unlikely that someone would write a letter to the administrator which merely speculated about Hentz' job performance. An actual complaint almost certainly would be based on some specific action which Hentz took, or should have taken but did not, which caused a difficulty for the letter writer.

In other parts of his testimony, Morrison resorted to generalities, often using "multiple" or "a multitude of" rather than being more specific. Not only is such testimony vague, it is also self-serving, leading me to conclude that Morrison either made up or greatly exaggerated Hentz' supposed shortcomings. Because I do not trust Morrison's testimony, I do not credit it when it conflicts with that of other witnesses.

Accordingly, I credit Hentz' account of his meeting with Morrison sometime in the latter part of October 2016. However, it may be noted that Hentz' testimony does not fully support the allegation in complaint paragraph 8(a) that Morrison told an employee "this is my building, and I'll do what the fuck I want." Hentz testified that Morrison did not fully say the vulgar expletive:

Q. You don't have to say what it was but can you in some way indicate what it was?
A. I'm sorry, Your Honor, but I'm going to say it. I mean he said what sounded like the word fuck.

Q. Did he actually say the word?
A. He did not. He left out the vowel sounds. He said MF, Your Honor.

Nonetheless, omitting the vowel sound does not change the message conveyed any more than it would, in writing, to substitute asterisks for letters. The message remains an emphatic proclamation that Morrison felt free to do as he pleased.

Complaint paragraph 8(a) further alleged that Morrison's words communicated to employees that it would be futile for them to engage in concerted activities for mutual aid and protection. In considering this allegation, I will apply an objective standard, taking into account the totality of circumstances, to determine how an employee reasonably would understand what Morrison said.[12]

[12] In considering whether communications from an employer to its employees violate the Act, "the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Scripps Memorial Hospital Encinitas*, 347

The General Counsel cites *South Jersey Sanitation Corp.*, 357 NLRB 1446, 1450–1451 (2011), in which the Board found that an employer's threat to "burn down the company before he let anyone extort him" was unlawful under the circumstances of that case. However, those circumstances differ significantly from those present here.

In *South Jersey Sanitation Corp.*, the company's owner asked an employee about a representation petition which another employee had circulated. The owner told the employee that the circulator of the petition was "no longer with us." Then, he added that he would "burn the company down" before he would let anyone extort him. Even apart from the "burn the company down" remark, the owner violated the Act when he interrogated the employee about the representation petition and when he implied that the circulator of the petition had been discharged because of his union activity.

Because the owner made the "burn the company down" statement while questioning an employee about the union organizing drive, and along with an implied threat to discharge other employees participating in the campaign, employees who heard that statement reasonably would understand that the owner was talking about the union. In this context, the owner's reference to someone extorting him reasonably would be understood to refer to a strike or other action the union might take to put economic pressure on the company during bargaining. The owner's "burn the company down" remark therefore conveyed the message that the owner would go to any length necessary to avoid agreeing to the union's terms. In other words, bargaining would be futile.

However, the allegation being considered here differs in both circumstances and substance. There was no union organizing campaign and, in fact, no union. There is no evidence to suggest that, during Hentz' conversation with Morrison, the subject of unions and collective bargaining even came up.

Hentz simply told Morrison that he had spoken "with some CNAs on the floor and they're really upset that you took those CNAs that Mary Ellen hired and put them in other positions rather than putting them on the floor to do work as a CNA on the floor." Someone hearing those words would be unlikely to conclude that these employees were thinking about joining or forming a union and demanding to bargain. Such an inference would have been reasonable in the *South Jersey Sanitation Corp.* case because there, the employees were circulating a representation petition and the conversation concerned that petition. In the present case, where there is no organizing drive or even talk about a union, such an inference would not be reasonable.

In the absence of a union or even any mention of a union, it would not be reasonable to believe that Morrison was making any kind of statement concerning what he would be willing to do to avoid agreeing to a union's demands. Moreover, unlike the owner in *South Jersey Sanitation Corp.*, who said he would "burn the company down," Morrison did not say he would do anything at all. He simply said, "this is my building and I'll do what the F I want."

In the absence of a union or a bargaining obligation which would constrain unilateral action, the statement that he would do what he wanted does not imply any intention to violate the law. It does not constitute any kind of threat. No one reasonably would interpret this statement to mean that the Respondent would take some action to make collective bargaining futile.

Accordingly, I recommend that the Board dismiss the allegations raised by complaint paragraph 8(a).

Complaint Paragraph 8(b)

Complaint paragraph 8(b) alleges that about October or November 2016, the Respondent, by Administrator Morrison, directed employees not to engage in concerted activities for mutual aid and protection by telling employees, "Stay in your lane," with respect to other employees' concerns about staffing and personnel issues. Complaint paragraph 14 alleges that this conduct violated Section 8(a)(1) of the Act. The Respondent denies these allegations.

In his work as scheduler, Hentz spoke with Brandi Sigmund, a licensed practical nurse working at the nursing home full-time. Sigmund also was taking courses to become a registered nurse. She had a scheduling problem because some of her nursing classes were at the same time she was supposed to be at work. The nursing home recently had started an on-call program and Sigmund believed that working as an on-call (or PRN) nurse would solve the scheduling conflict. Therefore, she asked Hentz to be placed on the on-call list.

However, Hentz did not have authority to change Sigmund from full-time to on-call status. So, he went to Morrison and explained the problem. Morrison told Hentz to speak with Melissa (Missy) Ellege, who was the nursing home's human resources/payroll coordinator. Hentz did. He described his conversation with Ellege as follows:

Q. Other than the two of you was anyone else present.
A. No, just me and Missy.

Q. What was said at that point?
A. She said that I could not schedule a PRN employee. She said that it didn't work that way. Brandi wanted to set up I guess sort of like a rotating schedule on weekdays, I don't know, for example, like every week Monday and Wednesday. And Missy said you can't do that because you're scheduling her and so in fact she would not be a PRN employee, but a part-time employee.

Perhaps Ellege's denial of the request is based on a reason weightier than bureaucratic inflexibility, but Ellege did not testify. It remains unclear why Ellege did not simply designate Sigmund a "part-time employee" and allow her to work Mondays and Wednesdays. After Hentz spoke with Ellege, he went back to Sigmund with the bad news. He described that conversation with Sigmund as follows:

Q. Do you recall where the conversation took place?
A. It was at her cart, in the hall.

Q. Was anybody else involved in the conversation?
A. No, it was just her. And I asked her if she wanted to go

NLRB 52 (2006); *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

into the nurse's station. She said, no, that she was fine, that we could talk right there.

Q. What was said during that conversation?
A. I said, well, I went to Justin. He sent me to Missy. Missy says that you can't do that because that is scheduling you. And she replied what the F. She said John Unger (ph.) used to do it.

Q. Who is John Unger?
A. He is a nurse. I can't remember if he is an RN or LPN. I think he's an RN that works—he's PRN as needed.

Q. Was anything else said in that conversation?
A. She was just saying how he got to choose what days he wanted to work. She didn't feel like it was fair to her that she was not able to do the same.

Quite understandably, the Respondent's denial of Sigmund's request upset her. She had no explanation for why the Respondent had allowed a man to work a schedule similar to the one she requested. Moreover, the reason Ellege gave for denying Sigmund's request seemed trivial at best: If Sigmund were placed on the PRN roster she could not have regular hours because if she did, then she truly could not be considered "on call."

Sigmund's reason for not wanting to work at certain times was legitimate and in fact admirable: At those hours, she would be in nursing classes which would increase her professional knowledge and, ultimately, qualify her for a promotion. Ellege's explanation for denying the request simply ignored Sigmund's reason as if it were unimportant. Moreover, the explanation proffered by Ellege did not suggest that the nursing home needed her at the hours she would be in class and did not point to any problem which would result if Sigmund were not present.

For example, if Ellege had said that the nursing home had been unable to find someone else with Sigmund's qualifications willing to work on the days Sigmund would be in class, it would have taken some of the sting out of the denial. Instead, Ellege gave an explanation which did not claim that the nursing home had a good reason for denying Sigmund's request but which, to the contrary, appeared to be little more than wordplay.

After he spoke with Sigmund, Hentz went back to Administrator Morrison's office where he spoke with Morrison alone. Hentz testified about their brief discussion:

Q. What was said during that conversation?
A. I came back and I said Brandi is really upset. She feels like John is getting to do something that she is not, to which he replied, Ricky, just stay out of it, stay in your lane, those are Brandi's problems, tell her to go see Missy, tell her to go see Mary Ellen, you just stay out of it.

Q. Was anything else said in that conversation?
A. I just said okay, showed him the schedule that I was working on, and I went back to my office.

Q. What was Mr. Morrison's demeanor at that time?
A. He was annoyed. I mean he was kind of red faced and just not being very welcoming. I mean it was obvious he didn't want to deal with it.[13]

For the reasons discussed above, I have concluded that Hentz' testimony is more reliable than Morrison's, and here I fully credit Hentz' account. However, in this instance, Morrison corroborates Hentz:

Q. Did you ever make a statement to Mr. Hentz to the effect of stay in your lane?
A. Yes.

Q. What was that in reference to?
A. I think that's my—kind of my military terminology but this was his job, this was his area of—his job was to work on the schedule, not to tell department heads what to do and to call people and threaten them and do multitudes of things that is not in his scope of practice.

Morrison's explanation implies that Morrison believed Hentz had told "department heads what to do." If Morrison had given the "stay in your lane" instruction while counseling Hentz not to "call people and threaten them" or not to "tell department heads what to do," then arguably the "stay in your lane" instruction could have carried the message Morrison described. However, Morrison was not giving Hentz counseling for supposedly threatening people or telling department heads what to do. He did not tell Hentz to "stay in your lane" as part of such a counseling session. Rather, he gave this order after Hentz had told Morrison about his fellow employee's request for a different schedule, a request that the director of health services had denied.[14]

[13] Morrison testified that his face often gets red even when he is not angry. However, in this instance, Morrison's own testimony –that Hentz should not be telling department heads what to do–suggests that Morrison felt irritation. Even if Hentz had testified that Morrison's skin had no more red in it than a dead fish, from the rest of Hentz' description of Morrison, and from Morrison's own testimony, I would conclude that he indeed was more than a little annoyed at this time.

[14] The Respondent noted in its brief that "There is no evidence offered that Mr. Hentz' statement was expressed as a group complaint or that Brandi or anyone else was disciplined in any way." However, Hentz had nothing to gain for himself when he told Morrison about Brandi Sigmund's request to work a schedule similar to that of a male employee. The fact that Hentz was not seeking any modification which would help himself personally, but rather was voicing to management the concerns of another employee, Sigmund, leaves no doubt that Hentz was engaged in concerted activity protected by the Act. The employees acting in concert were Sigmund and Hentz speaking on her behalf.

Moreover, for purposes of analyzing whether a manager's statement interferes with the exercise of employee rights, it is not necessary for any employees already to have exercised those rights at the time the manager made the statement. Rather, the harm lies in the chilling effect such statement could produce on employees' willingness to exercise their rights in the future. A statement made to even one employee violates Sec. 8(a)(1) if its effect reasonably would be to interfere with, restrain or coerce that employee in the exercise of Sec. 7 rights. Therefore, even assuming, incorrectly, that Hentz was not engaging in protected activity when he urged Morrison to grant Sigmund's request, it would not affect whether or not Morrison's "stay in your lane" instruction violated the Act.

Moreover, the credited evidence does not support Morrison's implied claim that Hentz had told any department head or other manager what to do. Of course, it is true that the person immediately under Morrison in the chain of command, Director of Health Services Ellege, had denied Sigmund's schedule request and Hentz was taking the matter over her head to the administrator.[15]

Strictly speaking, doing so was not telling a department head what to do but rather seeking to get her decision reversed. However, although a lawyer might roughly characterize Hentz' action as an "appeal" of Ellege's decision, someone with a military mindset might consider it the disobedient refusal of a soldier to accept his orders, an insubordinate attempt to have them countermanded by an officer of higher rank. The response of the annoyed senior officer might well be an angry "stay in your lane."

Morrison's use of what he called "kind of my military terminology," as well as his angry reaction, suggests that he was still applying notions of military protocol to a civilian employment situation. If a sergeant gives a private an order, the private doesn't often reply that he wants to check with the captain first.

However, notwithstanding that the nursing home may have been providing services to veterans under government contracts, and even though its wings were named Alpha, Bravo, Charlie, and Delta, it was not part of the military and its employees were not soldiers. In civilian life, Hentz did not have to preface his comments with a request for "permission to speak freely, sir," and what Hentz said was neither rude nor insubordinate. Rather, in speaking up for another employee about a work-related matter, Hentz was engaging in activity protected by Section 7 of the Act.

In considering the message which Morrison's words reasonably would communicate, the Board takes into account the totality of circumstances. Those circumstances certainly include Morrison's vexed demeanor, which added an imperative tenor to the order "stay in your lane." A typical employee who observed Morrison's demeanor reasonably would conclude that the administrator intended for his instructions to be followed and might impose discipline for failure to do so. In this context, it carries an implied threat.

Additionally, under all the circumstances, an employee reasonably would understand the words "stay in your line" to mean that the employee was not to protest how a supervisor had treated a fellow employee. Thus, it amounted to an instruction not to engage in activity protected by Section 7 of the Act.

Therefore, I recommend that the Board find that the Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraph 8(b).

Complaint Paragraph 10

Complaint paragraph 10 alleges that about November 28, 2016, the Respondent disciplined employee Hentz by issuing him a final counseling. Complaint paragraph 13 alleges that the Respondent took this action because of Hentz' protected activities. Respondent denies these allegations and the related allegation, in complaint paragraph 14, that this conduct violated Section 8(a)(1) of the Act.

The relevant events began almost 3 weeks earlier, on November 9, 2016. As discussed above, on that date Hentz spoke with two other nursing assistants, Linda Brinson and Danielle Jeter. All three of them had received disciplinary warnings from one supervisor, Amy Ferguson, and all believed that Ferguson treated African American employees differently from the way she treated other workers. After his discussion with Brinson and Jeter, Hentz spoke with a number of other employees concerning racial prejudice by management. These conversations fall within the protection of Section 7 of the Act. So does what Hentz did next, communicating the employees' concerns to the nursing home administrator.

Administrator Morrison was not at the facility at the time, but Hentz contacted him by telephone. Hentz told Morrison, "I feel like Amy definitely treats African Americans differently than she do others, and I'm not the only one. I've had that conversation with other people as well who felt like there definitely was a discrepancy in the way that she treated African Americans. I mean she was very standoffish and whatnot. And I told him that I was going to go to corporate."

Morrison told Hentz that he had the option of calling the corporate office if he wished to do so. Hentz did, using the Respondent's toll-free "hotline" to the corporate headquarters.

As discussed above under the "Hentz' Protected Activity" heading, a corporate-level manager, Ellis, later returned Hentz' call about his complaint. Although I have resolved testimonial conflicts by crediting that of Hentz rather than Ellis, the two witnesses really do not disagree much about the facts, even though their opinions about the conversation differ sharply. Hentz testified that the conversation began as follows:

> Q. What was said?
> A. She introduced herself, I'm Tammy Ellis. I'm calling regarding your call to corporate and the complaints. I said thank you. She said can you tell me about it? I told her that myself as well as some other staff members there felt like Amy and some other staff members were definitely racists. I mean it was the way they treated you was totally different. I mean, Karen Shook witnessed. You know, it was very obvious.

Additionally, the fact that no one was disciplined is irrelevant to whether or not Morrison's statement constituted an unfair labor practice.

[15] It may be noted that Hentz later went over Morrison's head, voicing to corporate management employee complaints about working conditions at the nursing home. Then, as in the instance under discussion here, Morrison became upset.

Thus, there is a parallel between Morrison's reaction when Hentz went over Ellege's head to voice employee Sigmund's complaint, and Morrison's reaction when Hentz later went over *his* head to corporate management. In each instance, Hentz was expressing other employees' complaints about employment discrimination.

Employee Sigmund had requested a schedule similar to that which a male employee was working. Ellege's denial thus created an issue of possible sex discrimination, which Hentz took to Morrison. When Hentz later contacted corporate management, he voiced employees' concerns about racial discrimination at the nursing home. Again, Morrison became angry.

Q. Who is Karen Shook?
A. Karen Shook is an LPN that works on Delta.

As Hentz described the problem to Ellis, he was not satisfied with her responses. He testified that she was defensive:

Q. Why do you say that?
A. Just she was trying to refute everything that I was saying. She was trying to explain it away. And finally I was like, look, we're here, we're experiencing this, I know what I know. I know what I see and what I feel. I know what I've experienced. And she said, well, I'm going to come do an investigation. And I said to her, well, I don't feel you can be impartial. I feel like no matter what you're going to take Justin's side.

Ellis' testimony paints a similar picture, although it focuses more on Hentz' frustrated reaction to her skepticism about his claim of racism. When she dismissed his concerns, he responded with frank language which offended her. She testified:

Q. And what do you remember from that conversation?
A. During that conversation, he raised concerns. He felt that there had been some racial discrimination at the facility by another partner. When we spoke about what his concerns were, and the issues that had happened, the examples he gave me didn't lead me to believe that it was racial discrimination, and when I asked him for more information, he got slightly upset during the conversation.

Q. You perceived him to be upset?
A. I perceived him to be upset.

Q. Why did you—on what basis?
A. Because when I explained to him that the two examples he gave, which the examples were eating ice cream in an area that you're not supposed to eat ice cream, and the other example was not saying good morning in the hallway, he got a bit aggressive and said, I'm sorry, she didn't call me the N word, though he said the full word to make it easy for me to see that it was racial discrimination.[16]

Q. Can you spell the N word for us?
A. N-i-g-g-e-r.

Q. And that was the full word that he used?
A. That is the full word he used.

Q. As a regional partner services manager, did you have a point of view on whether it was appropriate for Mr. Hentz to make that statement?
A. I thought it was very inappropriate.

Q. Why did you feel that way?
A. It's inappropriate language. It's inappropriate language for anyone to be using in our workplace. Even when filing a grievance, that would be inappropriate and would lead to disciplinary action.

Q. Did you have an opinion as to whether Mr. Hentz's statement was respectful or disrespectful?
A. I felt it was disrespectful.

In sum, Ellis' notes and her testimony show that after Hentz described what he considered a racially hostile work environment, and after he told her about a specific instance in which black and white employees were treated disparately, she nonetheless dismissed what he had said as unimportant. Hentz, taken back by Ellis' response, replied to the effect that there could be racial prejudice in the nursing home even if people didn't go around uttering a particularly vile epithet. This certainly was a legitimate point because prejudice doesn't always result in hard-to-ignore symptoms any more than an infection necessarily causes a 104 degree fever.

It should be stressed that Hentz did not call or refer to anyone with the vulgar epithet but only used the word to illustrate an extreme and unmistakable symptom of racial prejudice. In other words, prejudice should not have to be that open, noxious, and unmistakable for management to recognize it.

From Hentz' perspective, Manager Ellis seemed more interested in denying the existence of prejudice than in dealing with it. Perhaps most revealing is Ellis' testimony concerning her reaction to Hentz' complaint of racial prejudice. She thought Hentz was disrespectful and could be disciplined.[17]

In general, the testimony of Hentz and Ellis, together with her notes, form a consistent picture of their conversation. However, to the extent that any conflict exists, my observations of the witnesses lead me to resolve such a conflict by crediting Hentz' account.

Based on Hentz' credited testimony, I find that he told Ellis "that myself as well as some other staff members there felt like Amy and some other staff members were definitely racists." Those words leave no doubt that he was expressing the work-related concerns of other employees as well as his own. Similarly, the instance of disparate treatment which Hentz gave, as reflected in Ellis' notes, illustrates that Hentz was describing a work environment hostile to other employees of color, not just to himself.

[16] However, Ellis' notes of her telephone conversation establish that Hentz did more than tell Ellis about his reprimand and a failure to say good morning. Hentz actually gave Ellis an example of perceived disparate treatment of white and black employees. Ellis' notes record that Hentz told her of a specific instance in which an African American employee received a reprimand for wearing tight yoga pants and another specific instance of a white employee who wore similarly tight pants without being reprimanded.

[17] Whether or not such a dismissive attitude runs deep in Respondent's corporate culture, Ellis certainly wasn't the only manager to display it. Indeed, one of the employees' complaints, as Hentz told investigator Mervin, was that "people do not feel they are being heard." And when Hentz relayed to the nursing home administrator the employees' complaints about understaffing, Morrison disingenuously replied "we're working on it" even though he believed there was no staffing shortage. Likewise, when Hentz told the administrator about employee Sigmund's scheduling need, Morrison did not react by sympathizing or even acknowledging the problem but instead, vexed, told Hentz to butt out, to "stay in your lane."

In this regard, Ellis' notes of her telephone conversation with Hentz contradict her testimony that Hentz only mentioned, as examples of discrimination, his reprimand for eating ice cream and a failure to say good morning in the hallway. Rather, Ellis' notes establish that Hentz told her of a specific instance in which an African American employee received a reprimand for wearing tight yoga pants and another specific instance of a white employee who wore similarly tight pants without being reprimanded.

The Board has consistently defined concerted activity as encompassing the lone employee who is acting for or on behalf of other workers, or one who has discussed the matter with fellow workers, or one who is acting alone to initiate group action, such as bringing group complaints to management's attention. *Kvaerner Philadelphia Shipyard*, 346 NLRB 390 (2006), citing *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). Hentz' complaint to Respondent's corporate-level management, on behalf of other employees as well as himself, clearly falls within the protection of Section 7 of the Act.

Section 7 does not include any requirement that an employee have a good faith belief in the merits of his complaint and therefore I do not consider that question here. However, it may be noted that the record includes some evidence consistent with Hentz' concerns.[18] Additionally, my observations of Hentz when he testified clearly leave no doubt that Hentz was acting earnestly and in good faith when he reported to corporate management that local managers were treating employees differently because of race.

When Hentz spoke with Ellis, he had asked that someone else conduct the investigation because he did not believe she could be impartial. The Respondent sent another manager, Mervin. She arrived at the nursing home on November 21, 2016.

On that day, but before Mervin's arrival, Morrison came to Hentz' office. Hentz credibly testified that Morrison shut the door and said, "Ricky, I've heard that there is someone coming to my building to do an investigation. Do you want to tell me what it's about?" Hentz replied "you know there's some staff that has some concerns here."[19]

Hentz testified that Morrison then said, "do you want to tell me what that's about? I said, well, I don't really know. At that point he became visibly upset. He snatched his things up, opened the door, and he left."

That exchange occurred on the day Mervin arrived at the facility. Morrison also demonstrated his distress later, on the day Mervin left the facility. Registered Nurse Horton credibly testified that, before Mervin's departure, Morrison remarked that Hentz kept talking to her. Horton also testified about a conversation with Morrison, whose first name is Justin, which took place a day or two later:

> Q. When you went into Mr. Morrison's office, who was present in the office?
> A. Crysta Bloomberg, Justin Morrison, and myself.
>
> Q. Was anybody else present?
> A. No.
>
> Q. When you arrived, what, if anything, did you see?
> A. Justin was very angry. He was red. His fist was clenched, forehead wrinkled. He was very visibly upset.
>
> Q. After you went in the office, was anything said?
> A. I asked him if he was okay. He said I'm tired of Ricky's shit. It's always something with him.

Morrison denied making this remark and Bloomberg, whose last name is now Dickens, denied hearing it. For reasons discussed above, I have concluded that Horton is a very reliable witness. In contrast, I believe Morrison's testimony does not deserve this level of trust.[20] Based on my observations of the witnesses, I do not credit Dickens' testimony to the extent it conflicts with Horton's. Accordingly, I find that Morrison did say "I'm tired of Ricky's shit."

Further, based on the credited testimony of Hentz and Horton, I find that the investigator's visit to the nursing home made Morrison visibly angry. Even though Morrison claimed that his face sometimes reddened when he wasn't angry, he did not assert that he clinched his fist at other times. Clinching a fist while using vulgar language, does not suggest a state of beneficent tranquility.

Horton had come to Morrison's office in search of Dickens, whom she wanted to see about an unrelated matter. Horton and Dickens left Morrison's office and, while walking down the hall to Dickens' office, had a brief conversation. Horton testified about it as follows:

> Q. As you proceeded to her office was anyone else with you other than Ms. Bloomberg?
> A. No, it was just her and myself.
>
> Q. What, if anything, was said on the way to her office?
> A. I asked Crysta what was going on. She told me that corporate had told them to let him go slowly because he can be dangerous and to document appropriately.
>
> Q. Did you know who she was referring to?
> A. Ricky.
>
> Q. How do you know that?
> A. Because it was a continuing conversation from Justin's office. I was trying to find out why he was so upset.
>
> Q. And was anything else said in that conversation?

[18] For example, while cross-examining Registered Nurse Horton, the Respondent's counsel asked her if she believed Administrator Morrison made choices based on race. Horton answered, "I do believe he does have some prejudice."

[19] Hentz' response constitutes further evidence that he had complained to corporate management not only on his own behalf but also on behalf of other employees.

[20] As discussed above, Morrison testified, in effect, that every morning he found that 5 or 6 letters complaining about Hentz had been slipped under his door. However, he could not produce any of them and testified that he did not keep them. Morrison's credibility will be discussed further below in connection with evidence indicating that the Respondent's proffered reasons for discharging Hentz were pretextual.

A. Yes.

Q. What else was said?
A. She told me that Justin had to be careful because this is the second complaint about race.

Dickens denied making the statements attributed to her. However, based on my observations of the witnesses, I credit Horton. Therefore, I find that Dickens did tell Horton that "corporate had told them to let [Hentz] go slowly because he can be dangerous and to document appropriately." Further, I find that Dickens also said that Morrison had to be careful because it was the second complaint about race.

The Respondent has stipulated that, during this time period, Dickens was its supervisor within the meaning of Section 2(11) of the Act. Additionally, Dickens, as director of health services, was a high-ranking manager at the nursing home, presumably second only to Morrison in authority. Therefore, I conclude that Dickens' statements are imputable to the Respondent and constitute an admission by the Respondent.

Both Morrison's statement that he was "tired of Ricky's shit" and Dickens' statement to Horton that corporate management had told Morrison to discharge Hentz but to do it slowly and with documentation took place 1 or 2 days after the investigator had left the nursing home. That was less than a week before the Respondent issued Hentz the "final warning" under consideration here. The timing, I conclude, is significant.

Employees must "punch" in and out when arriving and departing, including for lunch breaks, and these punches are recorded electronically. Employees also have to take a full 30-minute unpaid lunchbreak or receive permission from a supervisor to take less time, which also would be documented. Morrison retrieved this documentation pertaining to Hentz. The record suggests that Morrison did so on November 21, 2016, the same day that the investigator arrived at the nursing home.

Morrison then issued Hentz a written warning labeled "Performance Document-Discipline 3-Final." That word "final" was portentous. It signified that discharge would be the penalty for a future infraction. The warning stated:

> Partner has multiple attendance occurrences. Missed punches, missed lunch reports. 10/11, 10/25, 11/10, 11/14, 11/15.

Morrison signed this warning and dated it November 21, 2016. Director of Health Services Dickens, whose last name was then Bloomberg, also signed it as a witness, and dated her signature November 21, 2016. However, Hentz testified that he received it "the Monday after Della Mervin came, so I would say that was November 28, 2016."

Mervin testified that she visited the nursing home on November 21, 2016, and her interview notes bear that date. The next Monday after that visit was November 28, 2016. Crediting Hentz' testimony, notwithstanding that the signatures of Morrison and Bloomberg on this warning are dated November 21, I conclude that they gave the warning to Hentz a week later. Therefore, I will refer to this document as the November 28, 2016 warning.

Based on the documentary evidence and credited testimony, I find that the General Counsel has proven that about November 28, 2016, Respondent disciplined employee Hentz by issuing him a final counseling, as alleged in complaint paragraph 10. Now, I must determine whether this action violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 14.

Wright Line Analysis

The Respondent asserts that it disciplined Hentz for attendance infractions and not, as the General Counsel alleges, because of Hentz' protected activities. Therefore, I must determine to what extent, if any, the Respondent considered those protected activities and to what extent they influenced Respondent's decision to impose discipline.

To do so, I will follow the analytical framework which the Board set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* test, the General Counsel has the initial burden of establishing that employees' protected activity was a motivating factor in the Respondent's taking action against them. The General Counsel meets that burden by proving protected activity on the part of employees, employer knowledge of that activity, and animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004) (citations omitted).

If the General Counsel makes this initial showing, the burden then shifts to the Respondent to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Id. at 563; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). See *El Paso Electric Co.*, 350 NLRB 151 (2007). However, if the Respondent's claimed reason for taking the disciplinary action is found to be pretextual, it cannot show that it would have taken the same action in any event. *Rood Trucking Co.*, 342 NLRB 895 (2004); *Austal USA, LLC,* 356 NLRB 363, 364 (2010).

Hentz' protected activities include discussing working conditions with fellow employees and expressing their concerns about those conditions to management, both at the local and corporate level. The Respondent's management clearly knew about these activities because Hentz management officials obviously were present when he told them about his fellow employees' concerns.

The Respondent's brief contends that "the overwhelming preponderance of the evidence shows that Mr. Hentz did not engage in protected, concerted activity; that the decision-maker, Mr. Morrison, had no knowledge of Mr. Hentz' alleged protected, concerted activity prior to issuing him a final warning for attendance and terminating his employment after he continued to violate the Attendance Policy; and no credible evidence shows Mr. Morrison took such action based on any unlawful animus."

At another point, the Respondent's brief states: "No evidence shows Mr. Hentz sought assistance from his coworkers in submission of any group complaint to the Veterans' Home. No evidence shows that Mr. Hentz circulated any petition or to have articulated any change in policy supported by two or more individuals and related to their working conditions."

A discussion under the heading "Hentz' Protected Activity," above, explained why I have rejected the Respondent's argument that Hentz' activities were not protected. Therefore, I will return to that issue only briefly here.

The Respondent's argument both understates the scope of activity protected by Section 7 and misunderstands what Hentz

actually did. An employee does not have to circulate a petition or propose a change in policy "supported by two or more individuals" to be protected by the Act. Hentz spoke with other employees about their work-related concerns and communicated those concerns to management. That is enough.

Section 7 does not require an employee to articulate a change in policy. Whatever the Respondent's policy might have been concerning racial prejudice, Hentz voiced a complaint not about Respondent's policy but about Respondent's perceived practices.

The assertion that Hentz engaged in no protected, concerted activity is simply wrong. The credited evidence clearly shows that he expressed to management, both at the nursing home and at the corporate level, the concerns of employees other than himself. As noted above, Morrison told Hentz to "stay in your lane" immediately after Hentz had urged Morrison to allow another employee to change her work schedule. Hentz had nothing personally to gain by advocating on behalf of this other employee.

When Hentz complained to management at the corporate level, he voiced not only his own concerns about racial prejudice at the nursing home but also expressed the similar concerns of other employees. Indeed, Hentz gave the management investigator the names of other employees to contact concerning this matter.[21] Even a nurse supervisor, Jennifer Horton, expressed the opinion that the nursing home administrator had "some prejudice," so the employees' perceptions of prejudice cannot be discounted as unfounded and their complaints about it cannot be dismissed as frivolous. If the top management official at the nursing home harbored prejudice, it would affect the working conditions not only of Hentz but of all African-American employees at that facility.[22] I find that Hentz made his complaint of racial prejudice not only on his own behalf but for other employees as well, and further conclude that his complaint constituted concerted activity protected by Section 7 of the Act.

The Respondent's brief also asserted that Morrison "had no knowledge of Mr. Hentz' alleged protected concerted activity." This claim must be rejected because that protected activity involved expressing the employees' concerns *to management*, including to Administrator Morrison.

The administrator hardly could be unaware that Hentz was voicing employees' concerns to management when he, Morrison, was the member of management to whom Hentz spoke. Indeed, after Hentz engaged in the protected activity of advocating that Morrison grant Sigmund's requested schedule change, Morrison replied "stay in your lane." Treating the Respondent's argument most charitably, it is possible that Morrison might not have known that the Act protected Hentz' right to speak on behalf of other employees. However, the administrator's possible ignorance of the law is not ignorance of the protected activity itself.

The record also includes convincing evidence of animus. When Hentz' complaint to corporate-level management resulted in an investigator coming to the facility, Morrison clinched his fist and said he was "tired of Ricky's shit."

Additionally, the Respondent's director of health services, Dickens, told Registered Nurse Horton "that corporate had told them to let him go slowly because he can be dangerous and to document appropriately." Dickens added that Morrison "had to be careful because this is the second complaint about race." Dickens' words suggest that management intended to discharge Hentz because of his complaint about race, which was part of his protected activity. (They also are consistent with the conclusion that management intended to conceal that reason by creating a "paper trail," which will be discussed further below.)

Morrison acted precisely in the manner Dickens described. He did not discharge Hentz immediately but instead issued a "final warning."

Therefore, I conclude that the General Counsel has carried the government's initial burden of showing that Hentz' protected activities were a motivating factor in the decision to discipline him. The burden therefore shifts to the Respondent to establish that it would have taken the same action even in the absence of protected activities. However, a respondent cannot carry this burden if its claimed reason for the discipline is pretextual. *Rood Trucking Co.*, above. As the Board explained, this "is because where 'the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the Wright Line analysis.' *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003)." *Rood Trucking Co.*, 342 NLRB at 898.

If the Respondent's reason for the disciplinary action is pretextual, I need not consider the evidence it offers to prove that it would have taken the same action even in the absence of protected activities. *Austral USA, LLC*, above. Therefore, I first consider whether the reasons for issuing the disciplinary warning were pretextual.

Pretext

Here, evidence strongly indicates that this "final warning" itself was part of the pretext. Crediting Horton's testimony, I have found that Dickens said that corporate management had told Morrison to discharge Hentz ("let him go") but also had cautioned Morrison to "go slowly because he can be dangerous and

[21] Based upon my observations of the witnesses, and for the reasons discussed earlier in this decision, I do not take at face value testimony claiming that Hentz said that he was speaking only for himself. Hentz was an outgoing, people−oriented person, whose personality stood in contrast to that of the more military Morrison. Hentz' advocacy on behalf of Sigmund's schedule request, advocacy from which he personally had nothing to gain, shows he was concerned about other employees. Moreover, the record clearly demonstrates that Hentz complained about racial prejudice only after other employees confirmed to him that they, too, felt that they had been treated differently. Even apart from Hentz' caring personality and the concern he demonstrated for other employees, the notion that Hentz received other employees' complaints of prejudice but then told management he was complaining only for himself is difficult to believe.

[22] Horton credibly quoted Director of Health Services Dickens as saying that Hentz' complaint was the *second* one about race. Clearly, employees other than Hentz were concerned about perceived prejudice in the workplace.

to document appropriately." In other words, Respondent's corporate management instructed Morrison to create a "paper trail" of documents which could be used to justify discharging Hentz.

The Respondent did discharge Hentz, on about November 13, 2016, ostensibly because of attendance problems. Thus, the final warning which Hentz received on about November 28, 2016, for supposed attendance problems does serve as documentation to support the later termination of Hentz' employment. Therefore, in considering the issue of pretext, I will examine not only whether the reason for the final warning itself was pretextual, but also whether it was part of a scheme to create a pretext which would conceal the actual reason for discharging Hentz.

The most obvious evidence of pretext is Dickens' statement to Horton, describing the instructions Morrison had received from corporate management to discharge Hentz but to do it slowly and to "document appropriately." As noted above, it appears that Morrison began the documenting process on the same day the investigator arrived by retrieving attendance records showing when Hentz clocked in and out of work.

Morrison testified that after he took charge of the nursing home in August 2016, he began tightening enforcement of the existing rules about attendance and punching in and punching out. Although Morrison was the overall administrator of the nursing home, for a period of time he also was Hentz' immediate supervisor. In fact, he had been Hentz' supervisor for a month at the time he issued the final warning. One of Hentz' supposed failures to punch in or out took place on October 11, 2016.

The General Counsel's brief argues that Morrison's slowness to discipline Hentz undercuts any conclusion that the new administrator pulled Hentz' time records only as part of a more general tightening of attendance enforcement. The General Counsel's argument has some persuasive power, but I do not believe timing alone, although raising suspicions, suffices to establish that Respondent's stated reason for discharging Hentz was pretextual.

Morrison's testimony itself provides some of the most convincing evidence of pretext. Not very subtly, and not at all convincingly, he labored to depict Hentz as a terrible and disruptive employee. His testimony that, every night, employees slipped 5 or 6 letters complaining about Hentz under his office door rang more than a little untrue when he could not produce even one of them. This supposed failure to retain the letters is even more unbelievable considering that corporate management had told him to "document appropriately" Hentz' shortcomings.

In concluding that Morrison wildly exaggerated the number and seriousness of complaints he received about Hentz, I take into account the feebleness of the evidence Respondent submitted to support Morrison's claim. Morrison's testimony comes close to depicting Hentz as terrorizing and intimidating the nursing staff, and not just rarely but continuously for more than a month. Morrison's testimony similarly portrays the nursing supervisors as barraging him with complaints about Hentz. The clear difference between what Morrison described and what the credited evidence established is so great it suggests that whatever Morrison claimed about the reason for discharging Hentz cannot be trusted.

When asked to name specific individuals who had complained to him about Hentz, Morrison answered "I would say probably all of the RN supervisors, Julia Conner, Mary Bosenberry, Tonya Gray, Frank McElrath and to the point where—it got to the point where they requested a meeting with me, all the nursing staff did." However, only one of those people he named, Registered Nurse Tonya Gray, testified. For reasons discussed below, I believe that Gray had a tendency to exaggerate and give little weight to her testimony.

Gray testified that she reported to Administrator Morrison that "the other RN supervisors who had voiced concerns to me about not being able to change the schedule to meet the needs. I voiced that the LPNs were—had concerns that they could not speak with the scheduler about the needs of their specific units and that the CNAs had concerns because they felt that they were not able to give continuity of care because they were being placed on different units frequently."

In considering Gray's testimony that the CNAs often were placed on different units, it should be noted that this problem was not Hentz' fault. Administrator Morrison testified that "the turnover is 50 percent" at the nursing home. With employees leaving and new ones being hired, some changes in work assignments would be expected and unavoidable.

Moreover, the employees repeatedly complained to Hentz that the nursing home was understaffed. In that situation, the absence of even one employee could require someone else to be reassigned to meet minimum staffing requirements on each wing. Again, that problem was not Hentz' fault. However, when Hentz relayed employee complaints about understaffing to Administrator Morrison, he took no action. Indeed, the record suggests that Morrison thought that the employees were not working hard enough. For example, Morrison told employees that they should not tell patients or their families that the nursing home was understaffed, and he testified, in effect, that a claim of understaffing was not true. (Indeed, his testimony suggests that he may even have considered the statement "we're understaffed" to be an excuse for laziness.)[23]

However, I do not credit Morrison's testimony that the nursing home was not understaffed. As noted above, he displayed a marked tendency to exaggerate and I do not consider his testimony reliable. Additionally, the record indicates that the Respondent actually paid a kind of bonus to employees who recruited others to work at the nursing home. That fact, together with the high turnover rate, leads me to conclude that there was indeed a shortage of CNAs, which in turn occasionally made it necessary to change their work assignments.

Additionally, Gray, who works at the facility as a registered nurse supervisor, was not a convincing witness. She testified about one occasion when, after she made changes to the work schedule, Hentz told her that she was not allowed to do so:

Q. When did that conversation take place?
A. It was approximately mid-October, to the best of my

[23] Issues concerning racial discrimination in employment neither fall within my authority nor are alleged in the complaint. Here, I do not decide whether Morrison actually harbored any racial prejudice or whether, if so, it affected his reaction to the employees' complaints about understaffing.

knowledge.

Q. And what do you recall Mr. Hentz saying to you during that conversation?
A. He showed me the schedule and asked why I had made changes to the schedule, and reprimanded me for making changes to the schedule. He told me that the only people that were allowed to make those changes were Justin, Crysta, and himself, and that anybody else who made those changes, it was considered a fireable offense.

Q. And how did you interpret his statement that other people making schedule changes would be a fireable offense?
A. I interpreted it as him telling me that he had the authority to fire me if I made changes to the schedule.

Q. Did you believe that to be true or not true that he had the authority to fire you if you made changes to the schedule?
A. I believed that according to his scope of practice he could not.

Q. Why do you say that?
A. Because certified nursing assistants, according to the North Carolina Board of Nursing cannot supervise registered nurses.

Q. Were you concerned or unconcerned about the information that Mr. Hentz was sharing to you?
A. I was very concerned about it.

Q. Why is that?
A. Because I did not feel that I was able to perform my job duties. I felt that not being able to change the schedule to meet the needs of the facility and acuity of the residents put my nursing license at risk, because I'm ultimately responsible for those residents during my shift.

However, on cross-examination, Gray admitted that the Respondent's policy, printed on the daily assignment sheet, did not authorize her to change the schedule. To the contrary, changes had to be approved by the director of health services (DHS). During the cross-examination the General Counsel handed Gray such an assignment sheet:

Q. And what is that document?
A. That is our daily staffing assignment sheet.

Q. And that's similar to the document that you referenced in your testimony about the daily staffing?
A. Yes.

Q. And just below where it says RN supervisor, it says no changes to schedule without consulting with DHS.
A. Right.

Q. And the DHS would be Crysta Bloomberg Dickens, I believe?
A. Yes, uh-huh.

Counsel for the Charging Party also cross-examined Gray concerning whether she had authority to change the schedule without prior approval by the director of health services. She appeared to believe that, because she was a registered nurse, she had such authority notwithstanding the Respondent's rule:

Q. BY MR. SHULTS: Yes. Mr. Hentz was correct in saying that the only changes to the schedule could be made by the facility administrator, Mr. Morrison, the DHS, or himself as the scheduler.
A. Not according to my registered nursing license.

Q. Well, I'm not concerned about your registered nursing license. I'm concerned about what the policy was at the facility. If you'll look at General Counsel's No. 3, do you have that in front of you?
A. This? Yes.

Q. It says at the top, no changes to the schedule without consulting with the DHS, correct?
A. Correct.

Q. That statement was on the schedules, all the schedules for the entire time you've worked at the facility, correct?
A. Correct.

Q. You understood that Mr. Morrison, as the facility administrator, could make final decisions about scheduling, correct?
A. Yes.

Q. And you understood that from this document no changes—the document stated no changes to schedule without consulting with the DHS, correct?
A. Right.[24]

[24] Gray also testified that she asked Administrator Morrison, presumably after this conflict with Hentz, if she had authority to change schedules and that Morrison said "RN supervisors could change the schedule to meet the needs of the facility, that resident care was always first and foremost. So if we had a unit that we felt needed more CNA staff in a unit that could spare one that we could reassign those CNAs."

Morrison described a meeting with Gray, but his testimony falls short of establishing that he gave her permission to make scheduling changes. He testified that "her main fight was that she would be able to have a say in who goes where or what staff members go to which areas based on the medical needs of the residents."

Respondent's counsel asked Morrison whether Gray's request was reasonable or unreasonable and Morrison answered "reasonable." However, that testimony does not establish that he granted Gray authority to ignore the language on the daily assignment sheet and make changes without first obtaining permission from the director of health services.

However, even assuming that Morrison allowed this deviation from the rule, and even assuming that he told Hentz to make this exception, there is no evidence that Hentz failed to follow such a direction after receiving it. To the contrary, Gray testified about Hentz that "I don't think that we ever didn't get along other than that one conversation." This testimony does not support Morrison's depiction of a situation in which the registered nurses continually were up in arms about Hentz.

It isn't clear why Gray apparently believed that her license as a registered nurse granted her authority which the nursing home's policy, written on the daily assignment sheet, denied to her. However, the issue of her authority was a matter between her and the nursing home and her attempt to blame Hentz fell into the category of "shoot the messenger."

Thus, when Hentz reminded her of the Respondent's policies, she interpreted what Hentz said as Hentz making a threat to discharge her. Or, at least she *claimed* that she believed Hentz was making such a threat. However, when cross-examined by the Charging Party's counsel, she admitted that she knew Hentz was not a supervisor and did not have authority to discharge her:

Q. You understood that whatever Mr. Hentz may or may not have said, you could always go to Mr. Morrison and get the changes to the schedule that you thought were appropriate.
A. Correct.

Q. You thought that at all times that Mr. Hentz was the scheduler.
A. Correct.

Q. You knew that he was a CNA, correct?
A. Correct.

Q. You knew he had no supervisory authority over him.
A. I knew—yes.

Q. So you knew that when he said it was a terminable offense to change the schedule without his permission that that was not something that could happen to you, that you could be terminated for that.
A. I felt that he was threatening me.

Yet the real problem appears to be that Gray believed that she, as a registered nurse, outranked Hentz and she resented his objecting to her changing the schedule he had made. Indeed, she testified, "I feel that the scheduler not allowing me to be able to change the schedule as the facility needs—to meet the needs of the facility is a CNA supervising an RN."

Gray further testified that the North Carolina Board of Nursing did not allow a registered nurse to be supervised by a CNA. However, she admitted on cross-examination that she never contacted that agency. She also admitted that she knew Hentz had no supervisory authority:

Q. And you understood that he had absolutely no authority to terminate your employment.
A. Correct, but I felt that he was threatening my job.

Gray's view, that Hentz' refusing to allow her to change the schedule amounted to a CNA unlawfully supervising an RN, does not square easily with her admitted knowledge that Hentz was not a supervisor. In my view, it reflects a personality clash between the two individuals.

Moreover, Gray seemed to season events with a drama they did not otherwise possess. For example, she interpreted Hentz' supposed "fireable offense" remark as a threat that he would discharge her. She also regarded Hentz' control of the schedule as the unlawful supervision of an RN by a CNA.

In any event, Gray's testimony on cross-examination establishes that she had no complaints about Hentz except for his reluctance to allow her to change the schedule and that she really clashed with him only once:

Q. Now, after your encounter with Mr. Hentz, did you start getting along better with him?
A. I never—I don't think that we ever didn't get along other than that one conversation.

Q. So except for that one conversation, you found him agreeable to work with?
A. I found that when I would go to him with a problem, he would become very defensive very fast and would not listen to why I needed to make changes.

Hentz' supposed defensiveness about changing the schedule is easy to understand. With a shortage of available employees, each schedule had to be built somewhat like a house of cards. Once completed, making even one change could necessitate other changes. Although Gray focused on adequate staffing for her particular unit, Hentz had to consider the needs of all units. In the absence of enough available workers, he faced a significant challenge just creating a schedule, let alone then having to change it.

In sum, although Morrison testified that a large number of employees were complaining about Hentz, I find that to be a great exaggeration. The most significant supporting evidence the Respondent produced was Gray's testimony, which basically showed her blaming Hentz for taking seriously the Respondent's rule that the director of nursing must approve all changes in the schedule.

As already noted, I believe Gray also had a tendency to exaggerate which diminishes the weight given to her testimony. However, even fully crediting that testimony, it does not show Hentz to have been a bad employee but rather a good one, faithfully adhering to the Respondent's rule even when pressured to ignore it.

Administrator Morrison also testified that Hentz made frequent errors when he prepared work schedules. However, in view of my conclusion that Morrison's testimony lacks reliability, I regard it, at best, as an extreme exaggeration of Hentz' shortcomings.

In preparing work schedules, Hentz had to cope with the understaffing problem. Additionally, to the extent he made mistakes, some arose from following the instructions of the previous director of health services, whom Morrison discharged. Moreover, when Morrison informed Hentz of the procedures he wanted Hentz to follow, Hentz made the changes Morrison desired. Morrison's testimony implies that Hentz may then have reverted to his previous practice but that testimony was vague. Because I did not find Morrison to be a reliable witness, I do not credit such vague testimony in the absence of other proof.

To the contrary, I conclude that Morrison strained to portray Hentz in a bad light by making unsubstantiated claims about him. Morrison's attempts to smear Hentz, unsupported even by the testimony of Gray, a witness the Respondent called, provides further evidence of pretext.

An email which Morrison sent to a corporate-level manager on December 13, 2016, the date Respondent discharged Hentz, constitutes still more evidence that the stated reason, attendance problems, was pretextual. Morrison sent this email at 8:29 a.m., well before the discharge took place. The email, to Corporate-level Manager Ellis stated, in part:

> In regard to Mr. Hentz. He accepted a position as a CNA and continues to bring up rumors and allegations regarding members of management.

Morrison testified that "rumors and allegations" referred to Hentz talking about a "relationship" between Morrison and the director of health services. However, nothing in the record indicates that Hentz was talking to other employees about Morrison's personal life. Similarly, no evidence suggests that Morrison confronted Hentz about his supposed gossiping. Likewise, the record does not indicate that Morrison complained to anyone else that Hentz was talking about Morrison's personal life. Rather, Hentz discussed working conditions with other employees and expressed their complaints about working conditions to management.

Moreover, even if the record showed that Hentz engaged in personal gossip about Morrison, which it does not, the reference to such activity, in an email the day of Hentz' discharge, still would cast doubt on the Respondent's assertion that it terminated Hentz' employment because of attendance problems. In other words, discharging Hentz because he gossiped about Morrison's personal life, but then claiming that the discharge was for attendance problems, would itself be pretextual.

However, I do not credit Morrison's testimony that Hentz was spreading rumors and allegations about Morrison's personal life and reject that supposed explanation for the comment in the email. Instead it appears likely that Morrison was referring to Hentz' complaints about working conditions, particularly that certain managers were racially prejudiced.

Although Morrison described at length Hentz' supposed performance problems as an employee, the discharge notice only gave one reason for the termination: Attendance problems. On cross-examination, Morrison stated that he discharged Hentz for both poor performance and poor attendance. He explained that he spoke with Corporate-level Manager Ellis before deciding to discharge Hentz only on one stated basis, attendance problems:

> Q. And what do you recall Ms. Ellis saying to you?
> A. Ms. Ellis told me that she would be in the facility in a few days and that we would review it and a few days went by, and her advise when she came into the facility was that we needed to terminate on grounds of attendance because performance is more subjective than attendance. Attendance is cut and dry. They're clear cut issues.

It may be argued that if there are two legitimate reasons to discharge an employee, and the employer gives only one of them as a reason for the action, that reason is not a pretext. It is a true reason, not one fabricated to conceal the true reason, and failing to state the other reason does not make the claimed reason false. Without disagreeing with the logic of that argument, it may be noted that the Respondent's decision to assert only one reason for discharging Hentz still has some relevance to the pretext issue.

It is consistent with other evidence showing that the Respondent set out to discharge Hentz, looked for a reason to do so, and found one which Morrison and Ellis believed would be accepted with little question. Morrison testified that two reasons, performance and attendance, occasioned Hentz' discharge. However, the stated reason for the discharge, attendance, was the less important of the two. Morrison's testimony, which goes on at considerable length about Hentz' supposed performance deficiencies but says relatively little about Hentz' attendance, suggests that attendance was merely an afterthought.

Respondent's decision to put forward only the less important reason, because it might be questioned less, demonstrates a focus on creating appearances, even if they did not reflect all the truth. The Respondent's willingness to create a misleading impression also becomes apparent in the way it conducted an "investigation" after Hentz voiced the employees' concerns about racial prejudice.

Hentz' complaint to corporate-level management resulted in one of those managers, Mervin, coming to the facility to investigate. For the following reasons, the perfunctory nature of her inquiry leads me to conclude that she was not interested in conducting a serious investigation to ascertain the facts, but rather was going through the motions so that it would appear that Respondent was taking seriously Hentz' claim of racial discrimination. Respondent's willingness to engage in such a sham investigation suggests that it would have no qualms about giving a sham reason for discharging Hentz.

Several reasons cause me to conclude that Mervin was not conducting a bonafide investigation to learn the facts. Although Hentz provided the names of other employees, neither Mervin's notes nor her testimony establishes that she actually talked with those individuals. Mervin did claim to have spoken with a number of employees in addition to Hentz and Ferguson, but did not record in her notes either their names or what they told her. A serious investigator reasonably would have written down at least the names of those she contacted and interviewed, even if such interviews produced little relevant information.

Another indication that Mervin wasn't interested in learning facts is that when Hentz told her something she did not understand, she did not ask him to clarify. Mervin's notes indicate that Hentz made a comment about a "dangerous building" but Mervin testified that she wasn't sure what Hentz had meant. It would be reasonable to assume that an investigator from the Respondent's corporate offices would care about employees' safety, not to mention the safety of the nursing home's residents, who were aged or disabled and, in some cases, demented. However, the record does not establish that Mervin asked Hentz what he meant by "dangerous building" or brought to anyone's attention the possibility that the building was unsafe.

Hentz also told Mervin that other employees believed that their licenses or certifications were "on the line." Mervin did not investigate, stating that it was "outside the scope of what I was there to do."

It must be wondered what Mervin really was *there to do*, if not to obtain facts which management needed to know. A number of government agencies regulate the nursing home so, without doubt, management would want to be informed about any

problems with the licensing of its staff.

Other circumstances buttress the conclusion that Mervin's "investigation" was more kabuki theater than Sherlock Holmes. If someone conducting a bonafide investigation received reports of a dangerous building, and of nurses fearful of losing their licenses, and if that investigator considered such matters outside the scope of her authority, she still would have communicated them to the nursing home administrator or to officials at the corporate level. The record does not establish that Mervin reported this information to anyone in authority and I must conclude that she did not.

In sum, Mervin conducted an "investigation" in which she did not contact the witnesses whose names Hentz provided, in which she did not write down the names of people she contacted or interviewed, and in which she ignored "red flag" statements about working conditions. She then reported to corporate managers that Hentz' claim of racial prejudice was unsubstantiated.

Mervin's seeming lack of interest in determining whether racial prejudice really existed in the workplace is particularly surprising because Hentz was not the first but the second person to complain about it. However, Mervin was not the only corporate-level manager who did not appear to take the issue of racial prejudice seriously.

The process which led to Mervin's visit to the nursing home began when Hentz used the corporate "hotline" to complain about racial prejudice. He left a message and Manager Ellis called him back. As discussed above, that conversation did not go well. As Hentz described what he believed to be evidence of racial prejudice, he sensed that Ellis was being dismissive and reacted with frustration. Ellis became annoyed, even considering that Hentz should be disciplined.

The Respondent then went to the expense of sending Mervin to the nursing home to investigate. However, her superficial effort leads me to conclude that she, too, did not take the complaint of racial prejudice seriously and simply went through the motions to create the appearance of an investigation. The Respondent's willingness to engage in this pretense suggests a willingness to be less than truthful about its reasons for discharging Hentz.[25]

Indeed, Dickens' statement to Horton indicates that the Respondent was going to use attendance as the basis for discharging Hentz, presumably because it could be documented. Even if Hentz' attendance could, in a vacuum, constitute grounds for discharging him, the very act of targeting him for discharge and then seizing upon attendance as a plausible reason makes that reason pretextual.

The Respondent contends that when Morrison arrived as the new administrator, he tightened enforcement of the nursing home's attendance policy. The record establishes that Morrison did, indeed, enforce the attendance policy more strictly. However, this fact does not overcome the persuasive evidence, discussed above, that Morrison targeted Hentz for discharge and seized upon attendance as a plausible reason to justify the discharge.

Indeed, the timing of events also is consistent with the conclusion that the Respondent used attendance as a pretext. Morrison began work at the nursing home in August 2016, and Hentz started working there September 20, 2016. However, Morrison pulled Hentz' attendance records on November 21, 2016, the day Mervin arrived to investigate Hentz' racial prejudice complaint.

Accordingly, I conclude that Respondent's stated reason for discharging Hentz—his supposed attendance problem—was pretextual. Part of this pretext involved the final warning issued to him on about November 28, 2016, because this warning created documentation to support his later discharge. In other words, this warning, by being part of the effort to create a pretext, was itself a pretext.

In view of my finding that the Respondent's actual reason for disciplining Hentz was a pretext, I conclude that the Respondent cannot carry its rebuttal burden under the *Wright Line* framework. Therefore, I recommend that the Board find that the Respondent violated Section 8(a)(1) of the Act, on about November 28, 2016, by issuing him a final warning, as alleged in complaint paragraph 10.

Complaint Paragraph 11

Complaint paragraph 11 alleges that about December 5, 2016, the Respondent demoted employee Hentz. Complaint paragraph 13 alleges that the Respondent took this action because of Hentz' protected activities. Complaint paragraph 14 alleges that the Respondent thereby violated Section 8(a)(1) of the Act. The Respondent's answer denies these allegations.

The evidence establishes without contradiction that on December 5, 2016, at a meeting in Morrison's office, Morrison relieved Hentz of his duties as a scheduler and offered him, in effect, a transfer to a position as a CNA performing patient care. Morrison testified that Hentz became angry and stormed out of this meeting. Hentz testified that he didn't storm out but walked out, and did so after Morrison "was done." Although Dickens also attended this meeting, her testimony reveals little about it. Based on my observations of the witnesses and for reasons discussed above, I believe that Hentz' testimony is more reliable than that of either Morrison or Dickens, and credit it. Therefore, I find that he did not storm out of the meeting but left when it concluded.[26]

Hentz credibly testified that, during this December 5, 2016 meeting, he has asked Morrison if there was anything he could do to change Morrison's decision to remove him from the scheduler's position. Morrison said that there was not.

The next day, Hentz accepted Morrison's offer of the position

[25] It should be stressed that the Board neither sets particular standards for employers conducting investigations nor requires employers to meet a certain standard, and I do not do so here. Rather, I simply conclude that Mervin's investigation was so perfunctory it cannot be considered a genuine attempt to ascertain the facts relevant to Hentz' complaint but rather was a show to make it appear that it had considered that complaint before rejecting it. Respondent's willingness to engage in this pretense suggests that it embraces the use of pretext in dealing with its employees.

[26] After leaving the meeting, Hentz telephoned the corporate–level manager who had visited the nursing home to investigate his earlier complaint. Mervin's testimony on this point was sparse, and vague as to date, but she confirmed that at some point after her visit to the nursing home, she received a call from Hentz. She testified that she explained to him that she was not assigned to his region, could not help him, and that he should contact Tammy Ellis.

of CNA performing patient care. However, he had no choice if he wished to remain employed at the nursing home. Morrison had said there was nothing Hentz could do to change his decision. Therefore, I find that Hentz' acceptance of the CNA work did not constitute a voluntary relinquishment of the scheduler's position.

The Respondent argues that Hentz had continued to make scheduling mistakes, which prompted Morrison to remove him from the scheduling position and put him to work "on the floor" doing patient care. However, I do not credit the testimony of Morrison and Dickens to this effect. Rather, based on Horton's credited testimony concerning what Dickens told her, I find that corporate management had instructed Morrison to discharge Hentz and also told him how to do it. In Dickens' words, as quoted by Horton, "corporate had told them to let him go slowly because he can be dangerous and to document appropriately."

Part of such documenting involved generating paperwork showing that Hentz' performance was deficient and to do that, they had to find reasons to discipline him. The credited evidence establishes that the December 5, 2016 action, removing Hentz from his scheduling duties, resulting in his reassignment to work fulltime performing patient care, was part of that scheme.

The Respondent contends that Morrison removed Hentz from the scheduler position because Hentz' performance in that position was unsatisfactory. However, I do not credit Morrison's testimony that Hentz made frequent errors in scheduling. For reasons discussed above, I have concluded that Morrison was not a reliable witness but instead inclined to wild exaggeration. Credible evidence establishes only that Hentz understandably resisted making changes in schedules he had prepared, but does not prove either that nurses frequently complained about him, as Morrison testified, or that he otherwise performed his scheduling work poorly or incompetently.

Accordingly, rejecting the testimony of Morrison and Dickens, I conclude that Morrison did not remove Hentz from the scheduling position and reassign him because of any work deficiencies but because of Hentz' protected activities and to create a pretext for later discharging him.

The Respondent notes that Hentz' rate of pay did not change and argues that changing his duties did not rise to the level of an adverse employment action. However, the record establishes that the work of a CNA performing patient care duties, such as lifting patients in and out of bed, was significantly more arduous than sitting at a desk and making work schedules. Therefore, I conclude that the position of a CNA performing patient care is not substantially equivalent to the position of scheduler. Accordingly, I further conclude that Hentz' reassignment did amount to an adverse employment action which fairly may be described as a demotion.[27]

In sum, the credited evidence establishes that Morrison, using the pretext that Hentz' scheduling work was unsatisfactory, relieved him of scheduling duties and reassigned him to work "on the floor" as part of Respondent's plan to portray Hentz in a bad light as a predicate to discharging him. The credited evidence also establishes that Hentz had engaged in protected activities, that the Respondent knew about those activities, and that Respondent harbored animus towards Hentz because of he had engaged in such activities. Therefore, I conclude that the General Counsel had established that Hentz' protected activities were a motivating factor in the decision to reassign him.

Because the government has carried its initial burden under *Wright Line*, the burden of proceeding typically would shift to the Respondent to show that it would have taken the same action against Hentz even in the absence of protected activities. However, the credited evidence establishes that Hentz' reassignment was part of a plan to create a pretext for discharging him. Moreover, the credited evidence further establishes that the asserted reasons for reassigning Hentz were pretextual. When a respondent offers a pretextual reason for taking an adverse action against an employee, it forfeits the opportunity to rebut the General Counsel's case.

Accordingly, I recommend that, by the conduct alleged in complaint paragraph 11, the Respondent violated Section 8(a)(1) of the Act.

Complaint Paragraph 12

Complaint paragraph 12 alleges that about December 13, 2016, the Respondent discharged Ricky Edward Hentz. Complaint paragraph 13 alleges that it did so because of Hentz' protected activities, and complaint paragraph 14 alleges that Respondent thereby violated Section 8(a)(1). The Respondent denies these allegations.

Hentz' account of the events leading up to the discharge bears little resemblance to Morrison's. For reasons discussed above, I conclude that Hentz's testimony is more trustworthy. For that reason, and additional reasons discussed below, I credit Hentz' account. The following summary of events is based on that credited testimony.

Hentz had accepted the CNA patient care position on December 6, 2016. When he came to work on December 9, he discovered that he was not on the work schedule. So, he clocked out. Time records establish that he was "on the clock" from 2:26 p.m. to 2:30 p.m. that day. (The relevance of this fact, that Hentz spent only 4 minutes at work on December 9, will become clear later during the examination of Morrison's markedly different version of what happened.)

On December 13, 2016, Hentz was working as a CNA in Alpha unit. He and another nursing assistant, Lucinda Geter, began talking as they worked. Two other employees, Nicky Bartlett and Heather Long, joined them. At some point, the conversation shifted from Hentz' removal from scheduling to the need for more staff members. They were discussing understaffing when a registered nurse, Jackie Walker, came up.

Hentz testified that Walker, "very stern said you guys are not short staffed; two is plenty on the floor." Hentz replied, "no, there is not enough on the floor and the residents feel differently." Hentz testified that Walker rolled her eyes, got the employees to sign an "in-service" memo (unrelated to this case) and then left.

[27] As the General Counsel's brief observed, relieving Hentz of scheduling duties and sending him to work "on the floor" significantly reduced the number of other employees with whom he came in contact and therefore provided him fewer opportunities to speak with other employees about terms and conditions of employment.

Two of the employees who were present—Geter and Long—testified. Their accounts corroborate Hentz' testimony. Bartlett and Walker did not testify.

About an hour later, Hentz' work took him to the nurse's station, where he was standing when Morrison and Dickens walked up. Morrison met with the nursing supervisor on duty for about 3 minutes, then approached Hentz and said, "why don't you just clock right out and go home." When Hentz asked why, Morrison said "I heard you've been disruptive all day."

Hentz replied that he had been in the Alpha wing all that day and that he knew that no one working with him had said anything to Morrison because none had left the wing. Hentz further testified:

Q. Was anything else said during that conversation?
A. He said why don't you just clock out and go home again. I said, well, why? He's like that's just where we're at right now. I said, well, if you're going to send me home, I'd like to know why, to which he responded I don't have to tell you anything, that's just where we are right now.

Q. Was that the end of the conversation?
A. It was.

By telephone the next day, Morrison discharged Hentz, who then called a corporate-level manager, Ellis. Hentz told her he had just been fired for attendance even though he had never missed a day of work. Hentz said the only day he missed was Thanksgiving and that was because Morrison had told him he could take the day off. Ellis replied that Morrison could discharge him for attendance.

Morrison's testimony does not accord with Hentz' account. One significant difference concerns what happened on December 9, 2016. In Hentz' version, he had arrived at the nursing home on that day but, discovering that he was not on the schedule, clocked out and promptly left. Contradicting Hentz, Morrison testified as follows:

Q. And did you—do you recall any events involving Mr. Hentz on December 9th?
A. I do.

Q. What do you recall about that?
A. I was working at my desk. I got a call from Mary Bosenberry who was a nursing supervisor, that Mr. Hentz did not show up for his shift at 2:00 and they needed some kind of help. There was an issue that they needed help with staffing on that hall. So I told them that I would be down there. I was in the middle of something, and I would be down there as soon as I can to assist.

Q. And what did you do next?
A. A few minutes went by. I walked down to the Alpha where Mary was. As I walked down the hall, I noticed that Mr. Hentz was actually at work and he looked like he had—he looked like he was charting information, and the fact that I had just gotten off the phone moments before, my brain immediately thought how could he be charting something if he just got to work because you chart information on the resident after you provide the care to the resident.

Q. What does charting refer to?
A. That's doing any kind of electronic charting on the resident, stating whether you changed the resident, so we can keep track of their bowel movements, keep track of their weights, their showers. So we are keeping our information as accurate as possible.

Q. And did you have any communications with Mr. Hentz at that time?
A. No. I actually went down the hall, I saw him off to the left at that exact time. At the front of Alpha, there was a call light going off, one of the residents on Alpha. So I immediately walked over to that resident's room, knocked on the door, asked if they needed assistance. That resident pointed him out and said that I do not want this person on this hall or in this facility, providing care for me because when he does, he comes in the room, turns the call bell light off and leaves or just does not provide care at all.

Morrison further testified that he then approached Hentz, asking him why he had been late to work and why he was not responding to the call light. According to Morrison, Hentz "rose his arms, got upset and said I'm just—I can't deal with this any more. I'm done, and started to make a scene. . . in the residence common area. At that point, I told him that he needed to go home."

Hentz denied having any conversation with Morrison on December 9. As discussed above, I have concluded that Morrison's testimony is not trustworthy. Moreover, there are additional specific reasons for doubting Morrison's testimony about what happened on December 9.

Morrison testified that Hentz made a scene in the residence common area. If Hentz indeed had been loud, someone would have noticed. However, no witness corroborated Morrison's testimony. The Respondent did not call as a witness the nursing supervisor on duty at the time, Mary Bosenberry, or any other witness to this supposed event.

Morrison testified that after this incident, he spoke with a number of people about it. Those people included the human resources/payroll coordinator, Ellege. However, the Respondent did not call Ellege as a witness.

According to Morrison, he also sought guidance from a Corporate-level Manager Ellis:

Q. And what do you recall Ms. Ellis saying to you?
A. Ms. Ellis told me that she would be in the facility in a few days and that we would review it and a few days went by, and her advice when she came into the facility was that we needed to terminate on grounds of attendance because performance is more subjective than attendance. Attendance is cut and dry. They're clear cut issues.

However, although Ellis testified, she did not refer to such a telephone conversation with Morrison.

Morrison testified that a resident complained about Hentz supposedly coming in the resident's room, turning off the call light, then leaving without providing care. Considering that the resident likely has serious medical problems, I would not expect that

person to come to the hearing and do not draw any adverse inference from Respondent's failure to call him.

However, it does seem significant that Respondent produced no document of any kind to confirm this incident. Neglecting a patient is a serious matter which presumably would result in paperwork. The Respondent did not offer into evidence any statement written or signed by the patient. Likewise, the Respondent did not produce any memorandum, nurse's note, chart entry or any other writing referring to such an incident.

The record does include one written document which is highly probative. Hentz' time clock printout shows that on December 9, 2016, he punched in at 14:26, that is, at 2:26 p.m., and clocked out 4 minutes later, at 14:30 p.m. This timesheet corroborates Hentz' testimony that he only was present at the nursing home briefly on that date.

Both the presence of evidence corroborating Hentz and the absence of evidence corroborating Morrison leads me to conclude that Morrison's testimony is not trustworthy. Instead, crediting Hentz, I find that the December 9, 2016 events described by Morrison did not occur.

A conclusion that Morrison made up something which did not happen imputes to him more serious misconduct than deciding that he exaggerated. Indeed, this conclusion is tantamount to finding that the witness committed perjury, and no judge should reach such a conclusion in haste or without clear evidence.

However, I believe that the time record for December 9, 2016, showing Hentz worked only 4 minutes that day, constitutes such evidence. Morrison did not testify merely that Hentz was working that day but gave specific testimony indicating that Hentz was neglecting a patient.

Is it possible that something similar to what Morrison described actually did happen, but that Morrison was mistaken as to the date? That possibility cannot be ruled out completely because, arguably, if a patient had been neglected the Respondent might be reluctant to describe it in a document which later might be seen by a government regulatory agency or used in a lawsuit. However, to conclude that such an incident did happen on a different date, and that the Respondent did not document the instance because it feared legal ramifications, is sheer speculation unsupported by evidence.

The record does establish that Hentz was on the clock only 4 minutes on December 9, 2016. It lacks evidence which would corroborate Morrison's testimony that, on this date, he found that Hentz was neglecting a patient, confronted Hentz about it, and that Hentz then made a scene and walked out. Moreover, it seems more than a little odd that, if Hentz really had engaged in this flagrant misconduct, the Respondent instead would discharge him for attendance.

For these conclusions, I must conclude that the administrator was willing to make up something that did not occur to place Hentz in a bad light, which itself would be pretextual.[28]

Credited evidence establishes that the final warning which Respondent issued to Hentz on about November 28, 2016, its removal of Hentz from the scheduler position on about December 5, 2016, and its discharge of Hentz on about December 13, 2016, were actions taken pursuant to a plan to "let him go slowly because he can be dangerous and to document appropriately." In other words, warning, demoting and then discharging Hentz were all part of the same plan.

Therefore, the *Wright Line* analysis of Hentz' discharge looks much like the analysis of Respondent's November 28, 2016 warning and its December 5, 2016 removal of Hentz from the scheduler position. Hentz clearly engaged in protected activities, discussing terms and conditions of employment with other employees and then expressing their concerns to management. The Respondent obviously knew about this protected activity. Morrison's negative reactions, including his comment that he was "tired of Ricky's shit," manifest animus. The General Counsel therefore has carried the government's initial burden, resulting in the burden of proceeding shifting to Respondent to establish that it would have taken the same action against Hentz even in the absence of protected activity. However, the Respondent's assertion of a pretextual reason for Hentz' discharge defeats any effort to rebut the General Counsel's case.

In sum, I conclude that the Respondent discharged Hentz because he had engaged in activities protected by Section 7 of the Act. Therefore, I recommend that the Board find that Respondent thereby violated Section 8(a)(1) of the Act.

Summary

In sum, I recommend that the Board find as follows with respect to the unfair labor practice allegations:

Complaint Paragraph	Violates 8(a)(1)	Description
6	Yes	Shepherd's instructions to employee not to discuss wages
7	Yes	Ellege's instruction to employee not to discuss wages
8(a)	No	Morrison's statement: "This is my building and I'll do what the F I want."
8(b)	Yes	Morrison's instruction to "stay in your lane."
10	Yes	Final warning to Hentz on about November 28, 2016
11	Yes	Demotion of Hentz on about December 5, 2016
12	Yes	Discharge of Hentz on about December 13, 2016

Remedy

The Respondent, having violated the Act, must remedy the effects of its unlawful conduct. The remedy shall include posting the Notice to Employees, attached as Appendix A, as prescribed

[28] Yet even Morrison's testimony, had it been credited, would have provided evidence of pretext. Morrison testified that Ellis came to the facility a few days after December 9, 2016, which would have been immediately before Hentz' discharge. According to Morrison, "her advice when she came into the facility was that we needed to terminate on grounds of attendance because performance is more subjective than attendance. Attendance is cut and dry. They're clear cut issues." However, stating a reason other than the actual reason for discharging an employee is the essence of pretext.

in the Order section of this decision.

The Respondent also must offer Ricky Edward Hentz immediate and full reinstatement to his former position as scheduler and make him whole, with interest, for all losses he suffered because of the Respondent's unlawful discrimination against him.[29] If the position of scheduler is no longer available, the Respondent must reinstate Hentz to a substantially equivalent position. However, as stated above, a position as a certified nursing assistant performing patient care is not substantially equivalent because it requires greater physical exertion. Additionally, it entails significantly greater risk than preparing work schedules at a desk.

The record establishes that, before his unlawful demotion, Hentz spent about 90 percent of his working time performing scheduling duties and about 10 percent of his working time providing patient care. Accordingly, if Respondent reinstates Hentz to a position other than his former position as scheduler, to be substantially equivalent the new position must require Hentz to perform patient care duties no more than 10 percent of his working time.

CONCLUSIONS OF LAW

1. The Respondent, Pruitthealth Veteran Services-North Carolina, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by instructing employees not to discuss their wages and by telling an employee to "stay in your lane," thereby instructing him not to express other employees' complaints about working conditions.

3. The Respondent violated Section 8(a)(1) of the Act on about November 28, 2016, by issuing its employee Ricky Edward Hentz a final warning.

4. The Respondent violated Section 8(a)(1) of the Act on about December 5, 2016, by demoting its employee Hentz from his position as scheduler to a position of certified nursing assistant performing solely patient care duties.

5. The Respondent violated Section 8(a)(1) of the Act on about December 13, 2016, by discharging its employee Hentz.

6. The Respondent did not violate the Act in any other way alleged in the complaint.

ORDER

The Respondent, Pruitthealth Veteran Services-North Carolina, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Instructing employees not to discuss their wages.

(b) Instructing employees not to express other employees' complaints about working conditions.

(c) Issuing disciplinary notices to, demoting or transferring to less favorable work assignments, and/or discharging employees because they expressed employee complaints about wages, hours or working conditions to local or corporate management, or because they discussed their wages, hours or other terms and conditions of employment with each other, or because they engaged in other activities protected by the National Labor Relations Act.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of the Board's Order, offer employee Ricky Edward Hentz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed.

(b) Make Hentz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline, demotion and discharge of employee Hentz, and within 3 days thereafter, notify the employee in writing that this has been done and that the discipline, demotion and discharge will not be used against him in any way.

(e) Within 14 days after service by the Region, post at its facilities in Black Mountain, North Carolina, copies of the attached notice marked "Appendix A."[30] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). In the event that, during the pendency of these proceedings, the

[29] Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

[30] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 9, 2016. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT tell employees that they may not discuss their wages or other terms and conditions of employment.

WE WILL NOT tell employees not to express other employees' complaints about working conditions or otherwise not to act in concert for their mutual aid or protection.

WE WILL NOT issue a warning to any employee for expressing other employees' complaints about working conditions or otherwise engaging with other employees in concerted activities for their mutual aid or protection.

WE WILL NOT transfer to a less favorable position or otherwise demote any employee for expressing other employees' complaints about working conditions or otherwise engaging with other employees in concerted activities for their mutual aid or protection.

WE WILL NOT suspend any employee for expressing other employees' complaints about working conditions or otherwise engaging with other employees in concerted activities for their mutual aid or protection.

WE WILL NOT discharge any employee for expressing other employees' complaints about working conditions or otherwise engaging with other employees in concerted activities for their mutual aid or protection.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reinstate employee Ricky Edward Hentz to his former position, or to a substantially equivalent position if his former position no longer exists, and make him whole, with interest, for all losses he suffered because of our unlawful discrimination against him.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discipline, demotion, and discharge of Hentz and WE WILL, within 3 days thereafter, notify him that the discipline, demotion and discharge will not be used against him in any way.

PRUITTHEALTH VETERAN SERVICES-NORTH CAROLINA, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-191492 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.